(16,165.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 114.

FANNIE P. WILLIAMS, MARY H. BELL, ROBERT RANSOM, JR., ET AL., APPELLANTS,

vs.

JOHN W. PAINE, ESTELLE T. PAINE, JOHN PAINE, AND OGLE TAYLOE PAINE.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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In the Court of Appeals of the District of Columbia.

FANNIE P. WILLIAMS *et al.* Appellants,
vs.
JOHN W. PAINE *et al.*
No. 421.

a Supreme Court of the District of Columbia.

FANNIE P. WILLIAMS, MARY H. BELL, Robert Ransom, Jr., James J. B. Ransom, Matt W. McCorkle Ransom, Henry H. Ransom, George G. Ransom, and Seymour H. Ransom
vs.
JOHN W. PAINE, ESTELLE T. PAINE, JOHN PAINE, OGLE TAYLOE PAYNE.
In Equity. No. 14529.

UNITED STATES OF AMERICA, *District of Columbia*, } *ss:*

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

Bill in Partition. Filed February 10th, 1893.

1 In the Supreme Court of the District of Columbia.

FANNIE P. WILLIAMS, MARY H. BELL, Robert Ransom, Jr., James J. B. Ransom, Matt W. McCorkle Ransom, Henry H. Ransom, George G. Ransom, and Seymour H. Ransom
vs.
JOHN W. PAINE, ESTELLE T. PAINE, JOHN PAINE, OGLE TAYLOE PAINE.
In Equity. No. 14529.

To the supreme court of the District of Columbia, holding an equity court for said District:

The complainants respectively state as follows:

1. The complainants are citizens of the United States and reside as follows: Fannie P. Williams, of Newton, North Carolina; Mary H. Bell, of Fort Snelling, Minnesota; Robert Ransom, Jr., of New York city, State of New York; James J. B. Ransom, of Marion, North

Carolina; Matt W. McCorkle Ransom, of Newton, North Carolina; Henry H. Ransom, of Monroe, Louisiana; George G. Ransom, of Manchester, Virginia, and Seymour H. Ransom, of New Berne, North Carolina.

2. The defendants are believed to be residents of the city of Troy, New York, and are each of them sued in their own right.

3. That on the (17th day of July, A. D. 1837,) Henry Hunt, being seized in fee of an undivided one-half of all that real estate known as square fifty-three (53) of the ground plat or plan of the city of Washington, in the District of Columbia, as a tenant in common with Benjamin Ogle Tayloe (the said Tayloe being seized in fee of the other half), (by his will dated on that day, devised his said one-half interest in said square to his three children, Mary Ran-
2 som, Fannie Hunt, and George G. Hunt, in fee as tenants in common, and shortly afterwards said Henry Hunt departed this life. The said will is duly recorded in the office of the register of wills of said District in Will Book —, at folio —, and leave is prayed to read the same or a duly certified copy thereof on the hearing of this cause).

4. That on or about the 23rd day of May, A. D. 1859, said Mary Ransom, now deceased, being so seized in fee in her own right of said one-sixth undivided interest in said square numbered fifty-three (53), joined with her husband, Robert Ransom, Jr., in executing a certain paper-writing purporting to give to said George G. Hunt a power of attorney to control, manage, grant, bargain, sell, and convey all their right, title, and interest in and to said square of ground; the said instrument of writing stands recorded among the land records of the District of Columbia in Liber N. C. T. Number 52, at folio 335, and leave is prayed to read the same or a duly certified copy thereof on the hearing of this cause, the said record being hereby made a part of this bill as fully as if the same were here set forth at length.

5. The said Robert Ransom was, at the time of executing said paper, an officer in the Army of the United States; but soon afterwards he and his said wife left the city of Washington and went to the State of North Carolina, where he resigned his commission as an officer of said army and was appointed an officer in the army of the Confederate States and at once engaged actively in the war then existing between the States of the Union.

3 6. On the 29th day of November, A. D. 1864, which was after the said Ransom and wife had departed to the State of North Carolina as aforesaid, and while the said Ransom was engaged as aforesaid in the said war, the said George G. Hunt, who was then an officer in the Army of the United States, executed and acknowledged a paper-writing, purporting to be executed by authority of the supposed power of attorney aforesaid, whereby he contracted to secure a conveyance from said Robert and Mary Ransom of all the right, title, and estate of said Robert and Mary in and to said square fifty-three (53) to said Benjamin Ogle Tayloe in fee. The said paper-writing is recorded in Liber N. C. T. Number 52, at folio 328, of said land records, and leave is prayed to read the same

or a duly certified copy thereof on the hearing of this cause, the said record being hereby made a part of this bill as if the same were here set forth at length.

7. Complainants are advised by counsel and so aver that both of said instruments of writing described in paragraphs four and six of this bill are invalid and void so far as they purport to affect any interest or title in said square of the said Mary Ransom.

8. That by mesne conveyances Julia D. Paine, now deceased, and then wife of the defendant, John W. Paine, acquired all the right, title, and interest of said Benjamin Ogle Tayloe, Fannie Hunt, and George G. Hunt in said square and thereafter departed this life intestate, seized as aforesaid of said square, and leaving surviving her her said husband as tenant by the curtesy and the defend-
4 ants Estelle T. Paine, John Paine, and Ogle Tayloe Paine as her children and only heirs-at-law.

9. That said Mary Ransom departed this life at New Berne, North Carolina, on the 7th day of February, 1881, intestate, and leaving surviving her her said husband, Robert Ransom, as tenant by the curtesy and the complainants, Fannie P. Williams, Mary H. Bell, Robert Ransom, Jr., James J. B. Ransom, Matt W. McCorkle Ransom, Henry H. Ransom, George G. Ransom, and Seymour H. Ransom, as her children and only heirs-at-law. Said Robert Ransom, surviving husband of said Mary Ransom, departed this life on the — day of ——, A. D. 1892.

10. Since the death of said Julia D. Paine and about the year 1890 the said John W. Paine, without the knowledge or consent of complainants, erected twenty-two large brick dwelling-houses upon said square, which said houses occupy the entire square, and each is now occupied by separate and distinct persons, renting severally from said Paine by separate and distinct contracts, and said Paine is and has been ever since, as complainants are informed and believe, receiving the rents and profits thereof, and has rendered no account to complainants of said receipts, though requested so to do.

11. Wherefore, as complainants are without a full and adequate remedy at law and to the end that they may have their said one-sixth interest finally and completely set off to them as well against the said John W. Paine as said reversioners, and an account of the rents and profits which have been received by said John W. Paine, complainants pray:

5 *Prayers.*

1. That the process of this court may issue against said defendants requiring them to appear and answer the exigency of the bill.

2. That the said instrument of writing purporting to have been executed by said George G. Hunt and described in the sixth paragraph of the bill be declared null and void as a cloud upon the title of complainants.

3. That the right of complainants to a one-sixth interest in fee as tenants in common in said square fifty-three (53) be established against all the said defendants by decree of this court, as well the life tenant as said reversioners.

4. That complainants may have the said one-sixth of said square set off to them in one undivided interest, if that be found practicable. and, if not, that a sale of said square may be had under the direction of this court and a distribution of the proceeds be made to the complainants and defendants as they may be found entitled.

6. That the said John W. Paine be required, under the direction of this court, to account to complainants for the rents and profits received by him from said square.

7. That for the purposes aforesaid all necessary accounts may be had, directions given, and inquiries ordered.

8. That the complainants may have such further and other relief as the nature of the case may require and to the court may
6 seem proper.

FRANKLIN H. MACKEY,
Sol. for Compl'ts.

The defendants to this bill of complaint are John W. Paine, Estelle T. Paine, John Paine, and Ogle Tayloe Paine.

7 *Demurrer to Bill.*

Filed May 15, 1893.

In the Supreme Court of the District of Columbia.

FANNIE P. WILLIAMS *et al.*
vs.
JOHN W. PAINE *et al.*
} No. 14529. In Equity.

The demurrer of John W. Paine, John Paine, Ogle Tayloe Paine, and Estelle Paine to the bill of complaint of Fannie P. Williams and others against these defendants in chancery exhibited.

These defendants, not admitting the jurisdiction of this court over them by the order of publication herein, but expressly denying the same, and not waiving their objection thereto heretofore made and overruled in this cause, but expressly insisting upon the same, and, by protestation, not confessing or acknowledging all or any of the matters and things in the said bill of complaint contained to be true as the same are therein set forth, do demur thereto, and for causes of demurrer show:

1. That the complainants have not in and by their said bill stated such a case as does or ought to entitle them to any such discovery or relief as is thereby sought and prayed for.

2. That the said bill is multifarious, in that it seeks several distinct and independent matters of relief from the same and from several of the defendants.

3. That the said complainants seek in their said bill to recover possession of real estate alleged by said bill to be adversely held by one of the defendants, and as to which relief the complainants have a full, adequate, and complete relief at law.

8 4. That the said bill seeks to compel a partition of land between parties out of possession and a defendant in possession and holding adversely to all the complainants.

5. That the complainants in and by said bill seek to have set up and established against the defendants a title to real estate of which one of the defendants is in adverse possession and claiming to own against all the complainants.

6. That the complainants, being out of possession and the defendants in possession and holding adversely to all the complainants, are seeking to have removed as a cloud on title certain conveyances to the defendants or some of them or to those under whom such defendants are averred to claim title.

Wherefore and for divers other errors and imperfections these defendants demand the judgment of this court whether they shall be compelled to make any other or further answer to the said bill or any of the matters and things therein contained, and pray to be hence dismissed with their reasonable costs in this behalf sustained.

WM. G. JOHNSON,
Solicitor for Defendants.

Affidavit waived.
FRANKLIN H. MACKEY,
Sol. for Pl'tffs.

I certify that the above demurrer is, in my opinion, well founded in law.

WM. G. JOHNSON,
Sol. for Def'ts.

9 *Order Overruling Demurrer.*

Filed July 6, 1893.

In the Supreme Court of the District of Columbia.

FANNIE P. WILLIAMS *et al.*
vs.
JOHN W. PAINE *et al.*
} Equity. No. 14529.

This cause coming on to be heard at this term upon the demurrer to the bill, and the same having been argued by counsel and considered by the court, it is thereupon, this 6th day of July, A. D. 1893, adjudged, ordered, and decreed that the said demurrer be, and the same is hereby, overruled, and the defendant is given leave to plead or answer until on or before the first rule day of September next.

E. F. BINGHAM, *C. J.*

10 *Answer of John W. Paine.*

Filed September 9, 1893.

In the Supreme Court of the District of Columbia.

FANNIE P. WILLIAMS *et al.*
vs.
JOHN W. PAINE *et al.*
} No. 14529. In Equity.

The separate answer of the defendant John W. Paine to the bill of complaint against him and others in chancery exhibited in the above-entitled cause.

This defendant, not admitting the jurisdiction of the court herein nor waiving his objection thereto heretofore made by his counsel specially appearing for that purpose, but expressly denying the jurisdiction of this court and insisting upon his objection thereto so as aforesaid heretofore made, and now and at all times hereafter saving to himself all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties, imperfections in the said bill contained, and not intending hereby to waive his demurrer to the said bill heretofore filed herein, but expressly insisting upon the same and answering said bill only under compulsion by the order of this court, for answer to the said bill or to so much thereof as he is advised it is material for him to make answer, answering, saith:

First. Answering the first paragraph of said bill, this defendant says he has no knowledge of the matters and things therein alleged and can neither admit nor deny the same, and if in any way material he demands strict proof thereof.

Second. Answering the second paragraph of said bill, this defendant says it is true that he is a resident and citizen of the State of New York.

11 Third. Answering the third paragraph of said bill, this defendant says that he has no knowledge and cannot therefore admit that Henry Huntt was, on the seventeenth of July, 1837, seized in fee of an undivided one-half of square fifty-three (53), in the city of Washington, District of Columbia, as tenant in common with Benjamin Ogle Tayloe, or that he died so seized, or that he devised the same to Mary Ransom, Fannie Huntt, and George G. Huntt, in fee as tenants in common, and therefore he demands strict proof of the said allegations; but whether he was ever so seized or not this defendant says that subsequent thereto and on June 21, 1864, the said Benjamin Ogle Tayloe was sole seized in fee of the said square fifty-three (53), and so continued sole seized in fee thereof until his death.

Fourth. Answering the fourth paragraph of said bill, this defendant does not admit that Mary Ransom was, on or about the 23rd day of May, 1859, seized in fee in her own right of an undivided one-sixth interest in the said square, and, if material, he demands

strict proof thereof. This defendant admits that on or about the 23rd day of May, 1859, at Carlisle, in the county of Cumberland, in the State of Pennsylvania, where the said Mary Ransom and Robert Ransom, Jr., her husband, were then residing, they executed and severally and separately acknowledged according to law an instrument of writing whereby George Gibson Huntt, who was the brother of the said Mary Ransom, was authorized to sell the interest of the said Mary Ransom and Robert Ransom, Jr., her husband, in and to square fifty-three (53), in said city; but he cannot admit that the said instrument of writing is correctly set forth and described in the said paragraph of said bill, and for greater accuracy
12 he prefers to refer to a certified copy of the said instrument hereunto annexed, marked Exhibit J. W. P. No. 1, which he prays may be taken and read as part of this answer.

Fifth. Answering the fifth paragraph of said bill, this defendant says that he has no knowledge as to whether the said Robert Ransom, Jr., was at the time of executing said paper an officer in the Army of the United States, and, if material, he demands strict proof thereof, nor can he admit that soon afterwards he and his wife left the city of Washington, went to the State of North Carolina, and that he resigned his commission in the Army of the United States and accepted an appointment in the army of the Confederate States and engaged in the war then existing between the States of the Union, and, if material, he demands strict proof thereof. Further answering said paragraph, this defendant says that he is informed and believes that there was no war existing between the States of the Union soon after the execution of said paper, and that said war did not occur until two years thereafter.

Sixth. Answering the sixth paragraph of said bill, this defendant says that he has no knowledge of the facts therein stated, except that he is informed and believes that in the summer or fall of 1864 the said Mary Ransom and her husband, Fannie Huntt, and George Gibson Huntt, through their counsel, Walter S. Cox, then a member of this bar and now an associate justice of this court, negotiated with Benjamin Ogle Tayloe for the purchase of any interest they had in square numbered fifty-three (53), and they, through their said counsel, agreed to sell to Benjamin Ogle Tayloe any such interest at and for the sum of twenty-five hundred dollars, which said sum was the full and fair value of an undivided one-half interest in fee-simple of said
13 square, and that said Benjamin Ogle Tayloe well and truly paid to their said counsel, Walter S. Cox, the said sum of twenty-five hundred dollars in lawful money of the United States; that in pursuance of such negotiation and agreement and in consideration of the said sum the said Fannie Huntt and George Gibson Huntt, executed and conveyed to the said Benjamin Ogle Tayloe all their interest in said square, and the said said George Gibson Huntt acting under the authority of the said Mary Ransom and, her husband, Robert Ransom, Jr., executed an instrument in writing, a certified copy of which is hereto attached, marked Exhibit J. W. P. No. 2, which it is prayed may be taken and read as part of this answer, which said instrument was intended by the said

George Gibson Huntt and the said Mary Ransom and Robert Ransom, Jr., her husband, and the said Benjamin Ogle Tayloe and the said Walter S. Cox, counsel for the said Huntt and Ransoms, and who as such counsel prepared the said paper, to pass all the right, title, and interest of the said Mary Ransom and her husband in and to the said square to the said Benjamin Ogle Tayloe, and the payment of the said sum by him, Tayloe, was made upon the faith that it did so pass the said interest as aforesaid.

And, further answering said paragraph, this defendant says that any interest which the said Mary Ransom or Robert, her husband, had in right of the said Mary Ransom or otherwise and of the said George Gibson Huntt and Fannie Huntt were equal, and that the said Mary Ransom received of the said twenty-five hundred dollars so paid as aforesaid by said Benjamin Ogle Tayloe one-third part thereof, to wit, eight hundred and thirty-three dollars thirty-three and one-third cents, lawful money of the United States, which
14 the said Mary Ransom with the knowledge and acquiescence of her husband, Robert Ransom, Jr., received and accepted in full satisfaction of any interest which she and he had in the said square.

And, further answering said paragraph, this defendant says that the said sum was so received and accepted as aforesaid with the full knowledge on the part of the said Mary and on the part of the said Robert Ransom, her husband, of the transaction, and was by them received in full satisfaction of any claim or demand they might have in and to said square and in ratification of the acts of the said George Gibson Huntt and of the said Walter S. Cox, as hereinbefore set forth; and this defendant says that he is advised and believes that the said Mary Ransom and Robert Ransom, Jr., and the complainants or any persons claiming through them are estopped from denying the validity and efficiency of the said transaction and of the instruments of writing hereinbefore referred to to pass to the said Benjamin Ogle Tayloe, his heirs and assigns, all the interest and estate of the said Mary Ransom and Robert Ransom, Jr., her husband, in and to the said square; and this defendant claims the same benefit of this defense by estoppel as though he had specially pleaded the same. Defendant further says upon information and belief that at the time of the said negotiations and purchase and conveyances hereinbefore detailed and of the payment of the purchase-money as hereinbefore set forth the said Benjamin Ogle Tayloe was in the possession of the entire square fifty-three (53), claiming to own the same in fee-simple in severalty, and that he and those claiming under him have ever since continued to hold the same in severalty and claiming to own the same in fee-simple.

15 Seventh. Answering the seventh paragraph of said bill, this defendant says he is advised and believes and therefore avers that the said instrument of writing hereinbefore referred to and in the fourth and sixth paragraphs of said bill mentioned are valid and binding in law and estop the complainants from setting up or asserting any right, title, or interest in and to the said square.

Eighth. Answering the eighth paragraph of said bill, this defendant says that it is true that Julia D. Paine died intestate and the wife of this defendant, leaving as her heirs-at-law the defendants Estelle T. Paine, John Paine, and Ogle Tayloe Paine, and he further says that she died seized in fee of the whole of said square fifty-three (53), and that this defendant was and is the life tenant thereof as tenant by the curtesy.

Ninth. Answering the ninth paragraph of said bill, this defendant says he has no knowledge as to any of the matters and things therein set forth and cannot admit nor deny the same, and, if material, he demands strict proof thereof.

Tenth. Answering the tenth paragraph of said bill, this defendant says that being desirous of deriving an income from said square as life tenant thereof during his own life and to provide a suitable improvement thereon for the benefit of his children, the heirs-at-law of himself and the said Julia D. Paine, deceased, namely, the defendants Estelle T., John, and Ogle Tayloe Paine, he has erected upon said square twenty-two substantial brick and stone dwellings, at a cost of about one hundred and twenty-two thousand dollars, and that the same are in the occupation of several and distinct tenants holding of and under this defendant and paying rent to him or his agents for that purpose appointed; that he has never ac-
16 counted to the complainants or any of them for any of the rents and profits derived from said square, and has never been requested so to do, but if so requested he would decline, as he denies and has always denied, as did also the said Benjamin Ogle Tayloe and all persons claiming under him since the year 1864, the right of the complainants or any of them to any participation in the said rents and profits or to any interest whatsoever in the said square and the improvements thereon.

Eleventh. Answering the eleventh paragraph of said bill, this defendant says that it is not true that the complainants are without full and adequate relief at law. On the contrary, he says that if they have any rights in and to the said square they have a plain and adequate remedy by action of ejectment at law for the possession of said square, and he claims the same benefit and advantage of this defense as though he had specially pleaded the same or demurred to the bill therefor.

And, further answering said paragraph, this defendant says that he and those through whom he claims have been in actual, open, continuous, hostile, and exclusive possession of the said square under claim and color of title for more than twenty years last past before the bringing of this bill, always claiming and holding adversely to the complainants and every of them and those through whom they claim, and denying the right of the complainants and every of them and those through whom they claim to any right, title, or interest in and to the said square or any part thereof, and he claims the same benefit and advantage of this defense as though he had specially pleaded the same.

And, further answering said bill, this defendant says that the said

Robert Ransom, Jr., in his lifetime filed a proceeding in
17 ejectment on the law side of this court, the same being numbered —— of the said dockets of this court, for the recovery of the possession of an undivided one-sixth interest in the said square, being the same undivided one-sixth interest claimed by the complainants herein, and that said suit was by him abandoned, and it is prayed that the record and proceedings in said suit may be taken and read as a part of this answer; and defendant also says that the complainants herein filed a suit in ejectment against this defendant, the same being numbered —— of the law dockets of this court, seeking to recover from this defendant an undivided one-sixth part of said square and also mesne profits thereof, and that said suit was for the recovery of the same undivided one-sixth interest now claimed by the complainants in this cause, and that the complainants voluntarily abandoned and dismissed the said proceeding; and it is prayed that the record and proceedings in said suit may be taken and read as a part of this answer. Defendant also says that the complainants filed another action in ejectment against this defendant, seeking to recover thereby an undivided one-sixth interest in the said square which they seek to recover in this bill, the said proceeding at law being numbered —— of the law dockets of this court, which proceeding is still pending and undetermined between the said complainants and this defendant; and it is prayed that the record and proceedings in said suit at law may be taken and read as a part of this answer.

Further answering said bill, this defendant says that he is advised and believes that even if the said interest, if any there
18 was, in the said Mary Ransom or Robert Ransom, Jr., her husband, did not pass to the said Benjamin Ogle Tayloe by the instrument of writing aforesaid, that nevertheless the said Benjamin Ogle Tayloe purchased the same in good faith and for full value accepted and received by the said Mary Ransom and Robert, her husband, and that this defendant has in good faith and while in possession of said square and claiming to own the same erected thereon substantial improvements; that during all the time for more than twenty-five years past all the taxes and other public dues and assessments against the said real estate have been paid by this defendant or those through whom he claims, and that neither the said complainants nor the said Mary Ransom nor Robert, her husband, nor any person through whom they or any of them claim has during the said time paid any of the taxes or other public dues or assessments against said land or in any way contributed to the improvement thereof, and that should the court ultimately decide that the complainants have an undivided one-sixth interest in the said land this defendant is advised and believes and therefore charges that they cannot recover the same without first indemnifying this defendant for the taxes and assessments paid upon the said square, and also for the costs of the improvements thereon erected, and that they are in equity also chargeable in any such accounting with the full amount of the purchase-money for the said interest in said square, namely, eight hundred and thirty-three dollars and thirty-

three and one-third cents, with legal interest thereon from the time of the payment thereof.

Further answering, defendant says that it is nowhere alleged in the said bill by the said complainants that the said Mary Ransom and Robert Ransom, Jr., her husband, did not receive the
19–28 full consideration for the undivided one-sixth part of said square, nor do they in their said bill offer to return the said sum, with legal interest thereon, and he is advised and charges that it is immaterial in this case whether the said instruments hereinbefore referred to be valid or not if the said Mary and Robert Ransom, Jr., agreed to part with their interest in the said square for the consideration mentioned and received and accepted the same in satisfaction thereof; they and those claiming through them are now and forever estopped from setting up or asserting any right, title, interest, or claim in the said square, and that they are in equity bound, if need be, to make proper conveyances to this defendant and his codefendants of all interests which the said Mary Ransom and Robert, her husband, had or they through her might have in the said square.

And, having fully answered, this defendant prays to be hence dismissed with his reasonable costs in this behalf so unjustly sustained.

JNO. W. PAINE.

WM. G. JOHNSON,
Sol. for Def't.

I do solemnly swear that I have read the annexed and aforegoing answer by me subscribed and know the contents thereof, and that the matters and things therein stated on my personal knowledge are true, and those stated on information and belief I believe to be true.

JNO. W. PAINE.

Subscribed and sworn to before me this twenty-first day of August, A. D. 1893.

EDWARD DOWNES,
[SEAL.] *U. S. Consul and ex Officio a Notary Public.*

* * * * * * *

29 These defendants, further answering, say that they are not in possession of the said square and have never been, the said title in fee having descended to them upon the death of their mother, Julia D. Paine, subject to the immediate right of possession and tenancy for life in their father and codefendant, John W. Paine, and that they have no interest or concern whatsoever as to any accounting between the complainants and the defendant John W. Paine, and that in so far as this bill seeks relief in that regard it is as to these defendants multifarious, and they claim the same benefit and advantage of this defense as though they had specially demurred to the bill therefor.

30 And, having fully answered, these defendants pray to be hence dismissed with their reasonable costs in this behalf so unjustly sustained.

ESTELLE T. PAINE.
JOHN PAINE.
OGLE TAYLOE PAINE.

WM. G. JOHNSON,
Sol. for Def'ts.

We do solemnly swear that we have read the annexed and aforegoing answer by us subscribed and know the contents thereof, and that the matters and things therein stated on our personal knowledge are true, and those stated on information and belief we believe to be true.

JOHN PAINE.
OGLE TAYLOE PAINE.

Subscribed and sworn to before me this twenty-first day of August, A. D. 1893, by John Paine and Ogle Tayloe Paine.

EDWARD DOWNES,
[SEAL.] *U. S. Consul and ex Officio a Notary Public.*

I do solemnly swear that I have read the annexed and aforegoing answer by me subscribed and know the contents thereof, and that the matters and things therein stated on my personal knowledge are true, and those stated on information and belief I believe to be true.

ESTELLE T. PAINE.

Subscribed and sworn to before me this fourteenth day of September, A. D. 1893.

CHARLES BRIMBLECOM,
[SEAL.] *Notary Public.*

31-35 *Replication.*

Filed September 26, 1893.

In the Supreme Court of the District of Columbia.

FANNIE P. WILLIAMS *et al.* *vs.* JOHN W. PAINE *et al.* } In Equity. No. 14529.

The plaintiffs join issue on the several answers of the defendants John W. Paine, Estelle T. Paine, John Paine, and Ogle Tayloe Paine and will hear the cause on the pleadings and testimony to be taken.

FRANKLIN H. MACKEY,
H. O. CLAUGHTON,
Sol's for Compl'ts.

* * * * * * *

36 Deposition of FANNIE P. WILLIAMS, who, being duly cautioned and sworn to tell the truth, deposes and says as follows:

1. To the 1st interrogatory, which is as follows: "State your name, age, and residence," she says:

Fannie Priscilla Williams; thirty-seven (37) years; Newton, North Carolina.

2. To the 2nd interrogatory, which is as follows: "What are the names of your parents?" she says:

Robert Ransom; Mary Elizabeth (known as Minnie) Hunt Ransom.

3. To the 3rd interrogatory, which is as follows: "State whether you are one of the plaintiffs in this suit," she says:

Yes.

4. To the 4th interrogatory, which is as follows: "Do you know the date of your parents' marriage; and if you say that you do, give the date and state the source or sources of your knowledge," she says:

Yes; February 7th, 1856; from the family Bible, from my parents, and from persons who witnessed the ceremony.

5. To the 5th interrogatory, which is as follows: "Are your parents living or dead; and if you say that they are dead, give the dates of their deaths," she says:

Both dead. Mother died February 7th, 1881; father died January 14th, 1892.

6. To the 6th interrogatory, which is as follows: "Did your parents have other children beside yourself; and if you say that they did, give their names, if you know, and also, if you know, the dates of their births," she says:

Yes; Mary Seymour Hunt, born Oct. 4, 1858; Robert and Gibson Hunt (twins), born December 26, 1860; James Boisseau Janes Hunt, born January 20, 1864; Matt Carry Whitaker Hunt, born February 4, 1866; Henry Hunt, born March 5, 1867; Geo. Gibson Hunt, born April 18, 1869; Seymour Herbert Hunt, born November 28, 1870.

7. To the 7th interrogatory, which is as follows: "Are any of your brothers or sisters dead; and if you say that any are dead, give the names and age at the time of death," she says:

37 Yes; Gibson Hunt, aged six months.

8. To the 8th interrogatory, which is as follows: "Do you know where your brothers and sisters are now residing; and, if so, state where they reside," she says:

Yes; Mary Seymour (Mrs. Geo. Bell) at Ithaca, New York; Robert at 317 Second avenue, New York; James Brettmer, North Carolina; Matt. (Mrs. Dr. McCorkle) at Newton, North Carolina; Henry at 1906 Avenue M, Galveston, Texas; George at Avondale, Alabama; Seymour, Brooklyn, New York.

9. To the 9th interrogatory, which is as follows: "Did your mother leave a will?" she says:

No.

10. To the 10th interrogatory, which is as follows: "Do you know what was your father's occupation during the years 1861, 1862, 1863, and 1864; and if you say that you do, state what that occupation was," she says:

Yes; he was occupied in the civil war.

11. To the 11th interrogatory, which is as follows: "If you say that he was in military service during said years, state in what army he served and in what capacity," she says:

He served in the Confederate army; was first made colonel and raised, near Ridgway, North Carolina, the first North Carolina cavalry; afterwards was promoted to be major general in the same way.

12. To the 12th interrogatory, which is as follows: "Have you a family Bible containing the records of your parents' marriage and the births of their children?" she says:

Yes; I have what was the original and only family Bible until 1874, after the birth of all my brothers and sisters, when on account of space to contain a record of deaths my father bought a large one and copied the record into it. The size accounts for its containing no record of my brother Gibson's death, which occurred in July, 1861.

13. To the 13th interrogatory, which is as follows: "If you say that you have, state how long said Bible has been in your possession and in whose possession it was before it came into yours," she says:

In my possession since my father's death, in 1892, and was kept by my father as long as he lived.

38 14. To the 14th interrogatory, which is as follows: "If you say that it was in your parents' possession before it came into yours, state how long it had been in their possession," she says:

The Bible was given to my mother at the time of her marriage to my father and was used by them as a family record until after the birth of their last child.

15. To the 15th interrogatory, which is as follows: "Do you know by whom the records of said marriage and births were entered in said Bible and in whose handwriting they are and when they were so entered; and if you say that you do, state by whom and when they were entered," she says:

The records were made by my father. They are in his handwriting and were made by him immediately after the occurrence of the events recorded.

16. To the 16th interrogatory, which is as follows: "What are the entries in said Bible of your parents' marriage and the births of their children and the deaths of any, if any died?" she says:

Gibson Hunt's death occurred in July, 1861, but was not recorded in the small Bible on account of space.

17. To the 17th interrogatory, which is as follows: "Will you file with the commissioner taking this deposition said Bible that it may be used in evidence in this case; and if you say that you will, then do so," she says:

Yes; I herewith file the same family Bible, marked Exhibit (B).

18. To the 18th interrogatory, which is as follows: "Do you know or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this cause or either of them or that may be material to the subject of this your examination or the matters in question in this cause? If you can, set forth the same fully and at large in your answer," she says:

I cannot.

FANNIE P. WILLIAMS.

Sworn to and subscribed before me this 18th day of November, 1893. —— ——.

39 Exhibit "B" referred to and filed with deposition of Fannie P. Williams is a Bible, on the fly-leaf of which is the following in writing:

Minnie Huntt, with the love & prayers of S. B. R.

"Take the helmet of salvation and the sword of the spirit, which is the word of God."

* * * * * * *

On the blank leaves between the Old and New Testaments is written the following record of births:

Robert Ransom, Jr., & Minnie Huntt, married, Washington city, D. C., February 7th, 1856.

Fannie Priscilla Huntt, eldest child of Robert & Minnie Ransom, born November 12th, 1856, Washington city, D. C.

Mary Seymoura Huntt, second child of Robert & Minnie Ransom, born October 4th, 1858, Carlisle, Pa.

Robert Huntt & Gibson Huntt (twin sons), third & fourth children of Robert & Minnie Ransom, born December 26th, 1860 (Indian Territory, Upper Arkansas river) (Fort Wise).

James Boissean Jones Huntt, fifth child of Robert & Minnie Ransom, born January 20th, 1864, at Dellwood, Chesterfield county, Virginia.

Matt Cary Whitaker Huntt (daughter), sixth child of Robert & Minnie Ransom, born February 4th, 1866, at Wilmington,
40–42 N. C.

Henry Huntt, seventh child of Robert & Minnie Ransom, born March 5th, 1867, at Wilmington, N. C.

George Gibson Huntt, eight- child of Robert & Minnie Ransom, born at Wilmington, N. C., the 18th of April, 1869.

Seymour Herbert Huntt, ninth child of Robert & Minnie Ransom, born at Wilmington, N. C., Nov. 26th, 1870.

* * * * * * *

43 *Leave to Amend Bill.*

Filed December 16, 1893.

In the Supreme Court of the District of Columbia.

FANNIE P. WILLIAMS *et al.*
vs.
JOHN W. PAINE *et al.*
} In Equity. No. 14529.

On petition of plaintiffs, by Franklin H. Mackey, Esq., their solicitor, it is this 16th day of December, A. D. 1893, ordered that plaintiffs have leave to amend their bill as prayed.

CHAS. C. COLE,
Asso. Justice.

44 *Amended Bill.*

Filed February 10, 1893.

In the Supreme Court of the District of Columbia.

FANNIE P. WILLIAMS, MARY H. BELL, ROBERT Ransom, Jr., James J. B. Ransom, Matt W. McCorkle ——, Henry H. Ransom, George G. Ransom, and Seymour H. Ransom
vs.
JOHN W. PAINE, ESTELLE T. PAINE, JOHN PAINE, OGLE TAYLOE PAINE.
} In Equity. No. 14529, Doc. 35.

To the supreme court of the District of Columbia, holding an equity — for said District:

The complainants respectively state as follows:

1. The complainants are citizens of the United States and reside as follows: Fannie P. Williams, of Newton, North Carolina; Mary H. Bell, of Fort Snelling, Minnesota; Robert Ransom, Jr., of New York city, State of New York; James J. B. Ransom, of Marion, North Carolina; Matt W. McCorkle ——, of Newton, North Carolina; Henry H. Ransom, of Monroe, Louisiana; George G. Ransom, of Manchester, Virginia, and Seymour H. Ransom, of New Berne, North Carolina.

2. The defendants are believed to be residents of the city of Troy, New York, and are each of them sued in their own right.

3. That on or about the month of September, A. D. 1838, Henry Hunt, being seized in fee of an undivided one-half of all that real estate known as square fifty-three (53) of the ground plat or
45 plan of the city of Washington, in the District of Columbia, as a tenant in common with Benjamin Ogle Tayloe (the said Tayloe being seized in fee of the other half), departed this life without having disposed by will or otherwise of said square fifty-three (53) and leaving as his only heirs-at-law his three children, to wit,

Mary Ransom, Fannie Huntt, and George G. Huntt, to whom said land descended equally.

4. That on or about the 23rd day of May, A. D. 1859, said Mary Ransom, now deceased, being so seized in fee in her own right of said one-sixth undivided interest in said square numbered fifty-three (53), joined with her husband, Robert Ranson, Jr., in executing a certain paper-writing purporting to give to said George G. Huntt a power of attorney to control, manage, grant, bargain, sell, and convey all their right, title, and interest in and to said square of ground; the said instrument of writing stands recorded among the land records of the District of Columbia in Liber N. C. T. Number 52, at folio 335, and leave is prayed to read the same or a duly certified copy thereof on the hearing of this cause, the said record being hereby made a part of this bill as fully as if the same were here set forth at length.

5. The said Robert Ransom was, at the time of executing said paper, an officer in the Army of the United States, but soon afterwards he and his said wife left the city of Washington and went to the State of North Carolina, where he resigned his commission as an officer of said army and was appointed an officer in the army of the Confederate States, and at once engaged actively in the war then existing between the States of the Union.

46 6. On the 29th day of November, A. D. 1864, which was after the said Ransom and wife had departed to the State of North Carolina as aforesaid and while the said Ransom was engaged as aforesaid in the said war, the said George G. Hunt, who was then an officer in the Army of the United States, executed and acknowledged a paper-writing, purporting to be executed by authority of the supposed power of attorney aforesaid, whereby he contracted to secure a conveyance from said Robert and Mary Ransom of all the right, title, and estate of said Robert and Mary in and to said square fifty-three (53) to said Benjamin Ogle Tayloe in fee. The said paper-writing is recorded in Liber N. C. T. Number 52, at folio 328, of said land records, and leave is prayed to read the same or a duly certified copy thereof on the hearing of this cause, the said record being hereby made a part of this bill as if the same were here set forth at length.

7. Complainants are advised by counsel and so aver that both of said instruments of writing described in paragraphs four and six of this bill are invalid and void so far as they purport to affect any interest or title in said square of the said Mary Ransom.

8. That by mesne conveyances Julia D. Paine, now deceased and then wife of the defendant John W. Paine, acquired all the right, title, and interest of said Benjamin Ogle Tayloe, Fannie Hunt, and George G. Hunt in said square and thereafter departed this life intestate, seized as aforesaid of said square, and leaving surviving her her said husband as tenant by the curtesy and the defend-

47 ants Estelle T. Paine, John Paine, and Ogle Tayloe Paine as her children and only heirs-at-law.

9. That said Mary Ransom departed this life at New Berne, North Carolina, on the 7th day of February, 1881, intestate, and

leaving surviving her her said husband, Robert Ransom, as tenant by the curtesy and the complainants, Fannie P. Williams, Mary H. Bell, Robert Ransom, Jr., James J. B. Ransom, Matt W. McCorkle Ransom, Henry H. Ransom, George G. Ransom, and Seymour H. Ransom, as her children and only heirs-at-law. Said Robert Ransom, surviving husband of said Mary Ransom, departed this life on the — day of ——, A. D. 1892.

10. Since the death of said Julia D. Paine and about the year 1890 the said John W. Paine, without the knowledge or consent of complainants, erected twenty-two large brick dwelling-houses upon said square, which said houses occupy the entire square, and each is now occupied by separate and distinct persons renting severally from said Paine by separate and distinct contracts, and said Paine is and has been ever since, as complainants are informed and believe, receiving the rents and profits thereof, and has rendered no account to complainants of said receipts, though requested so to do.

11. Wherefore, as complainants are without a full and adequate remedy at law, and to the end that they may have their said one-sixth interest finally and completely set off to them as well against the said John W. Paine as said reversioners, and an account of the rents and profits which have been received by said John W. Paine, complainants pray:

48 *Prayers.*

1. That the process of this court may issue against said defendants requiring them to appear and answer the exigency of the bill.

2. That the said instrument of writing purporting to have been executed by said George G. Hunt and described in the sixth paragraph of the bill be declared null and void as a cloud upon the title of complainants.

3. That the right of complainants to a one-sixth interest in fee as tenants in common in said square fifty-three (53) be established against all the said defendants by decree of this court, as well the life tenant as said reversioners.

4. That complainants may have the said one-sixth of said square set off to them in one undivided interest, if that be found practicable, and if not that a sale of said square may be had under the direction of this court and a distribution of the proceeds be made to the complainants and defendants as they may be found entitled.

6. That the said John W. Paine be required, under the direction of this court, to account to complainants for the rents and profits received by him from said square.

7. That for the purposes aforesaid all necessary accounts may be had, directions given, and inquiries ordered.

8. That the complainants may have such further and other relief as the nature of the case may require and to the court may seem proper.

FRANKLIN H. MACKEY,
Sol'r for Complainants.

49 The defendants to this bill of complaint are John W. Paine, Estelle T. Paine, John Paine, and Ogle Tayloe Paine.

50 & 51 *The Joint and Separate Answer of Defendants.*

Filed January 23, 1894.

In the Supreme Court of the District of Columbia.

FANNIE P. WILLIAMS *et al.*
vs.
JOHN W. PAINE *et al.*
} No. 14529. In Equity.

The answer of the defendants to the amended bill filed herein, reserving to themselves & each of them all & all manner of objections heretofore made, either of special appearance, motion, or demurrer, howsoever made, answering, say they have no personal knowledge of any of the matters & things in said amendment specified & set forth &, if material, demand strict proof thereof, save that they admit upon information & belief that Henry Huntt left him surviving as his only heirs-at-law Mary, otherwise known as Minnie Huntt, afterwards Mary Huntt Ransom; Fannie Huntt, now Fannie Huntt Gibson, and George Gibson Huntt.

JOHN W. PAINE,
ESTELLE T. PAINE,
JOHN PAINE,
OGLE TAYLOE PAINE,
By WM. G. JOHNSON,
Their Solicitor.

WM. G. JOHNSON,
Sol. for Defendants.

Affidavit waived & signatures also.

FRANKLIN H. MACKEY,
Sol. for Pl'ffs.

* * * * * * *

52 WASHINGTON, D. C., *November* 21, 1893,
TUESDAY—at 3 o'clock p. m.

Met pursuant to notice.

Present: Franklin H. Mackey, Esq., solicitor for complainants, and Calderon Carlisle, Esq., solicitor for defendants.

Whereupon Gen. JOHN G. PARKE, a witness produced on the part of the complainants, being first duly sworn according to law, was examined and testified as follows:

Direct examination.

By Mr. MACKEY:

Q. You are an officer in the United States Army?
A. Yes.

Q. And were in 1852 and 1853?
A. Yes, sir.
Q. And up to the war and through the war?
A. Yes.
Q. Were you acquainted with one Lieutenant Robert Ransom?
A. Yes, sir.
Q. Do you know whether he was married or not?
A. Yes; I was present at the ceremony?
Q. In what capacity?
A. I believe as one of his groomsmen?
Q. Whom did he marry?
A. He married Miss Huntt; I think known generally as Miss Minnie Huntt.
Q. That was her nickname, Minnie Huntt?
A. That is my impression; if I recollect right there were
53 two sisters, and the name of the one he married was Minnie Huntt.
Q. When did he marry her, General?
A. The date I cannot state, but it occurred subsequent to the winter, I think, of 1851 and 1852, and prior to a date about two years preceding 1857. My reason for stating this is that I was not at that time of my service over a year in any one place, and I was in Washington during the winter and away during the summer for a year and back again, so that the exact date I do not remember.
Q. You say she was married Minnie Huntt. Do you know whether her name was Mary or not?
A. No; I do not.
Q. Do you know who she was the daughter of?
A. Well, my impression is that she was the daughter of Doctor Huntt, and that General Gibson, a commissary general of the army, was her guardian. I think at this time she was an orphan.
Q. Do you know one George Gibson Huntt, an officer in the army at that time?
A. I remember George Gibson Huntt. Whether he was at that time an officer in the army I do not remember, but I have known him since as an officer of the army.
Q. Do you know what his relation was to Miss Huntt, who married General Ransom?
A. Well, no; I cannot say; I presume he was a brother, but I won't be certain.

Mr. CARLISLE: No cross-examination.

JOHN G. PARKE.

Subscribed and sworn to before me this 22d day of November, A. D. 1893.

J. ARTHUR LYNHAM,
Examiner in Chancery.

54 Mr. MACKEY: I offer in evidence the following deeds:
A deed from Robert Ransom, Jr., to George Gibson Huntt, dated May 23, 1859, recorded January 14, 1865.

A deed from George Gibson Huntt to Benjamin Ogle Tayloe dated November 29, 1864, recorded January 14, 1865.

And a deed from George W. Peter to Henry Huntt and Benjamin Ogle Tayloe, dated January 23, 1837, recorded January 27, 1837.

Filed by the examiner, marked Exhibits J. A. L. Nos. 1, 2, and 3, respectively.

Objected to by Mr. Carlisle.

The taking of testimony on the part of the complainants is here announced as closed.

* * * * * * *

55 PLAINTIFFS' EXHIBIT J. A. L. No. 1.

Filed January 31, 1894.

Liber N. C. J. 52, folio 330.

Robert Ransom, Jr., to George Gibson Huntt. } Recorded 14th January, 1865. Power of Attorney.

Know all men by these presents: Whereas Lieut. Robert Ransom Jr. of the United States Army and Mary his wife in right of the said Mary *an* seized in fee-simple as tenants in common, with the sister and brother of the said Mary to wit: Fanny Huntt and George Gibson Huntt and with B. O. Tayloe of certain lots of ground in the city of Washington in the District of Columbia which are described as follows: Lots No. one and three in square No. five; lot No. ten in square No. fourteen lots five and nine in square No. seventeen lots No. three and four in square No. twenty-eight lot No. three in square No. thirty; and the entire square No. fifty-three. To provide for the contingency of our absence we the said Robert Ransom Jr. and Mary my wife do by these presents constitute and appoint and in our place put and depute the said George Gibson Huntt of Washington city aforesaid to be our true and lawful attorney-in-fact, for us and in our name place and stead, to control, manage, grant, bargain and sell and in that event convey all our right, title and interest in and to the said lots and square of ground or any part or parts thereof, or to join in and for us and in our name to sign any proceedings in partition of the said lots and square or to appear for us in court for that purpose: And in regard to the said real estate to do execute and perform every act and thing necessary to be done as fully and amply as we might or could do if personally present. And we do hereby ratify and confirm all and whatsoever our said attorney-in-fact may legally do in the premises.

In witness whereof we the said parties to these presents have hereunto set our hands and seals this twenty-third day of
56 May A. D. one thousand eight hundred and fifty-nine.

R. RANSOM, JR. [SEAL.]
M. H. RANSOM. [SEAL.]

Witness- present:
S. H. GRAHAM.
A. L. SPONSLER.

STATE OF PENNSYLVANIA, } *sct:*
County of Cumberland, }

Personally appeared before me, president judge of the ninth judicial district of Pennsylvania, Robert Ransom, Jr., and Mary, his wife, the parties who executed the within and foregoing power of attorney, who are personally known to me, and acknowledged the same to be their act and deed, to the end that the same might be recorded as such according to law, and the said Mary, being *being* of full age and by me examined separate and apart from her said husband, declared that she did execute and acknowledge the same freely and voluntarily and without being induced to do so by fear or threats of or ill usage by her said husband or by fear of his displeasure, and then and there did in my presence sign and seal the same out of the presence and hearing of her husband.

In witness whereof — have hereunto set my hand and seal this twenty-fourth day of May, A. D. 1859.

J. H. GRAHAM.

STATE OF PENNSYLVANIA, } *sct:*
County of Cumberland, }

I, Philip Quigley, the prothonotary of the court of common pleas of Cumberland county, which is within the ninth judicial district of the State aforesaid and part thereof, do certify that the Hon. James H. Graham is the president judge of the said judicial district, with full power and authority to take the acknowledgments of deeds, and that full faith and credit are due to all his official acts as such.

In testimony whereof I have hereunto set my hand and the seal of said court, at Carlisle, the twenty-fourth day of May, A. D. 1859.

P. QUIGLEY, *Proth'y.* [INT. SEAL.]

57 STATE OF PENNSYLVANIA, } *sct:*
County of Cumberland, }

I, Hon. James H. Graham, president judge of the court of common pleas of Cumberland county aforesaid, do hereby certify that Philip Quigley, who makes the above certificate, is the prothonotary of the court of common pleas of said county, and that his certificate is in due form.

In testimony whereof I have hereunto set my hand and seal the twenty-fourth day of May, A. D. 1859.

J. H. GRAHAM. [SEAL.]

Endorsement.

Fee, $1.50.

This is to certify that the within is a true and verified copy of an instrument as recorded in Liber N. C. T. No. 52, folio 330 *et seq.*, one of the land records of the District of Columbia.

February 6, 1893.

[Seal Office of the Recorder of Deeds, Washington, D. C.]

GEORGE F. SCHAYER,
Dep. Recorder of Deeds.

58 PLAINTIFF'S EXHIBIT J. A. L. No. 2.

Filed January 31, 1894.

Liber N. C. J. 52, folio 328.

George Gibson Huntt to Benjamin Ogle Tayloe. } Recorded 14th January, 1865. Contract of Sale.

Know all men by these presents, that I, George Gibson Huntt, by virtue of the annexed power of attorney to me from Robert Ransom Jr. and Mary Ransom his wife, and for and in consideration of the sum of eight hundred and thirty-three $\frac{33}{100}$ dollars to me in hand paid by Benjamin Ogle Tayloe, of the city of Washington in the District of Columbia, receipt of which is hereby acknowledged have bargained and sold to said B. O. Tayloe, his heirs and assigns, all the right, title, and estate of them, the said Robert Ransom Jr. and Mary Ransom, being one undivided third part of, in, and to these pieces of ground in the city of Washington aforesaid, known and described, as lots Nos. one and three in square No. five lot No. ten in square No. fourteen, lots Nos. five and nine in square No. seventeen, lots Nos. three and four in square No. twenty-eight, lot No. three in square No. thirty and the whole of square No. fifty-three, with the improvements and appurtenances; and I hereby further agree in behalf of said Robert and Mary Ransom, that they shall and will, as soon as convenient, make and execute a proper deed of conveyance of said premises to said Benj'n O. Tayloe, in fee-simple.

In testimony whereof I have hereunto set my hand and seal this 29th day of November A. D. 1864.

GEORGE GIBSON HUNTT. [SEAL.]

[Stamp, $1. G. G. H. Jan. 4th, '65.]

Witness:

W. KLINE.

STATE OF PENNSYLVANIA, } *sct:*
County of Dauphin, }

We, John Magluchlin & W. Kline, aldermen and *ex officio* justices of the peace in and for the county aforesaid, do hereby cer-
59–63 tify that George Gibson Huntt, party to a certain contract of sale bearing date in the year of our Lord one thousand and eight hundred and sixty-four, and hereto annexed, personally appeared before us at our county aforesaid, the said George Gibson Huntt being personally well known to us as the person who executed said contract, and acknowledged the same to be his act and deed.

Given under our hands and seals this January 4th, A. D. 1865.

JOHN MAGLAUCHLIN, [SEAL.]
Ald, ex Officio J. of P.

W. KLINE, [SEAL.]
Ald., ex Officio Justice of the Peace.

DAUPHIN COUNTY, *ss:*

I, Josiah C. Young, clerk of the common pleas court of Dauphin county, and having official cognizance of the fact, do hereby certify that John Maglauchlin & W. Kline, Esquires, before whom the aforegoing acknowledgment was made, were at the date thereof justices, as they purport to be.

In testimony whereof I have hereto set my hand and affixed the seal of said court on this tenth day of January, A. D. 1865.

J. C. YOUNG, *Clerk.* [INT. SEAL.]

[Stamp, 5 cts. J. C. Y. Jan'y 1, 1865.]

* * * * * * *

64 & 65 *Replication to Answer to Amended Bill.*

Filed February 2, 1894.

In the Supreme Court of the District of Columbia.

FANNIE P. WILLIAMS *et al.*
vs.
JOHN W. PAINE *et al.*
} In Equity. No. 14529.

The complainants join issue on the answers of the defendants to the amended bill, and will hear the case on the pleadings, testimony, and exhibits.

FRANKLIN H. MACKEY,
Solicitor for Compl'ts.

* * * * * * *

66 JOHN W. PAINE, witness for defendants.

Direct examination by Mr. WILLIAM G. JOHNSON:

Q. Please state your place of residence.
A. 49 Second street, Troy, New York.
Q. Do you know the defendants Estelle T. Paine, John Paine, Ogle Taylor Paine?
A. I do know them all.
Q. What relation do you bear to those three defendants?
A. I am their father.
Q. Who was their mother?
A. Julia Dickinson Taylor.
Q. Is Mrs. Paine living or dead?
A. Dead.
Q. When did she die?
A. On the 26th of February, 1872.
Q. When were you and Miss Taylor married?
A. On May 3rd, 1865.
Q. Was she the mother of these three defendants?
67 A. She was.
Q. Did you know Benjamin Ogle Taylor?

A. I knew Benjamin Ogle Tayloe.
Q. Is he living or dead?
A. Dead.
Q. About when did he die?
A. It is the same day of the month as my wife's death. He died on the 25th of February, 1868, in the city of Rome, Italy.
Q. Do you know the property in the city of Washington, District of Columbia, described as square numbered 53?
A. I do.
Q. State when you first had any personal knowledge of the square.
A. After it fell to my wife in the division of her father's real estate.
Q. When was that?
A. Do you mean when the deeds passed?
Q. I mean about the date of the time when the division you spoke of was made?
A. The division was made in '69; I think the latter part of the year '69.
Q. You say that your first personal acquaintance with the property occurred some time in 1869?
A. Yes, sir.
Q. Do you know whether or not your wife, Mrs. Paine, ever made any claim to the ownership of that property?
A. Yes, sir; I know she claimed to own it.
Q. For how long did she claim to own it?
A. She claimed to own it from the time it was deeded to her by the executors of Benjamin Ogle Tayloe.
Q. From that time till when?
A. Till the time of her death.
Q. Do you know whether or not she, through herself or through any one else, exercised any acts of ownership over the property.

68

Mr. MACKEY: Objected to as incompetent on the ground that it is not competent for a husband to testify as to any facts the knowledge of which was obtained from his wife.

A. She did through me, as her husband.
Q. Will you please state what acts of ownership you exercised over that property in behalf of your wife?
A. The principal acts I performed were the payments of taxes.
Q. Did you do any other act with respect to the property during her lifetime?
A. Yes, sir; I rented it several times.
Q. Do you remember for what purposes you rented it?
A. I rented it once to a man that made asphalt or concrete or some pavement in the city of Washington. He occupied the whole square and made his pavement there. I rented it to him for a few years
Q. Did you rent it to any one else?

A. Yes, sir; I rented it to a party by the name of H. Tumelty for a coal and wood yard.

Q. Did those persons pay any rent for the premises?

A. Yes, sir.

Q. To whom did they pay it?

A. They paid it to my agent in Washington.

Q. I will ask you to state whether in renting the property you rented it in your own behalf at that time or in behalf of your wife.

A. I rented it in behalf of my wife, as it was her property.

Q. After the death of Mrs. Paine did you exercise any acts
69 of ownership over that square?

A. Yes, sir; ever since her death I have.

Q. I would like you to state, if you know, whether you and the other defendants claim any title to the property.

A. We do.

Q. Have you and they claimed title before now?

A. Yes, sir.

Q. For how long?

A. Ever since her death.

Q. Ever since Mrs. Paine's death?

A. Yes, sir.

Q. Will you state, if you know, whether the taxes on that square have been paid since 1869 or not?

A. They have been.

Q. Will you please state, if you know, who has paid them?

A. I have paid them. My agent, although he receives my rents in Washington, he does not pay my taxes. I have my tax bills in Washington sent direct to me at home, and I remit for taxes myself.

Q. Did you observe that practice in regard to square 53?

A. I did; I paid taxes only the other day to the 30th of June.

Q. I wish you would state whether or not there were any improvements on that square in 1868, at the time of Benjamin Ogle Tayloe's death.

A. I think it was vacant; indeed, I know it was vacant.

Q. Were there any improvements on it at the time of Mrs. Paine's death?

A. Nothing at all.

Q. Are there any improvements on the property now?

A. There are.

Q. Will you please state what those improvements consist of?
70 A. There are twenty-two dwelling-houses.

Q. What is the character of them? What kind of houses are they? Are they frame or——

A. No, sir; they are brick and stone dwellings.

Q. Will you please state how much of square 53 those improvements cover?

A. They cover every bit of it, except that there are yards to all the houses but one; but the facades, the fronts—the street- are all lined with dwellings.

Q. I will ask you to state, if you know, who placed those improvements on that square?

A. I contracted with an architect in Washington to build them for me.

Q. Will you state who paid the price for building them?

A. I paid it.

Q. Can you state what the total cost of those improvements was?

A. Yes, sir.

Q. What was it?

A. Well, it may not be in round cents or dollars quite one hundred and twenty-five thousand dollars, but it was within (I guess) two hundred dollars of one hundred and twenty-five thousand dollars.

Q. Can you remember about the time when those houses were completed—the year?

A. You want me to name the very year they were built?

Q. As near as you can recall; as near as you can remember.

A. I will not swear definitely about the year. I should say those houses were built in the vicinity of six years.

Q. Six years ago?

A. Yes, sir; it may be less or more, but in that vicinity.

Q. From the time those houses were finished I wish you to state what use has been made of them, whether they have been
71 rented or not to tenants.

A. They have rented when tenants could be found; sometimes, as now, they are not all occupied.

Q. They have been generally rented?

A. They readily rent, and have been rented pretty much all the time. There are perhaps half a dozen of them that are vacant now; that is owing, I suppose, to the financial times. At all events they are vacant; they are readily rented, and have been rented ever since they have been habitable.

Q. Will you please state, if you know, who has received the rents from those houses?

A. The rents have been paid to B. H. Warner & Company, my agents.

Q. As your agents?

A. As my agents.

Q. Have they been remitted to you?

A. Yes, sir.

Q. I would like you to state whether you have received those rents as your own or for other persons.

A. I have received those as my own.

Q. I would like you to state whether at any time from the death of your wife to the present you have admitted any right, title, or interest in that property in any other person than yourself.

A. Whether I have admitted any right?

Q. Yes.

A. No, sir; I never have.

Q. How is it with reference to your children in respect to this

property? Have you ever admitted any right or title in them in this property?

A. The fee is in them, and I recognize it is their property.

Q. What is the nature of your own claim of right to it?

A. The nature of my own claim is that I have the curtesy in the land during my life, and it is my money that made the
72 improvements.

Q. Then I understand that you claim the property for your life?

A. I do.

Q. And after your life estate you admit the title to be in your children. Is that correct?

A. I do.

Q. I will ask you to state whether your wife, Mrs. Julia Dickinson Paine, left any will.

A. She did not.

Q. State, if you know, whether any person other than your wife and yourself or persons representing her or you have ever exercised any acts of ownership over this property since the death of Mr. Tayloe.

A. They never have other than that the executors exercised the right until his real estate was divided.

Q. What executors do you mean?

A. The executors of Ogle Tayloe before the division of his real estate.

Q. Are those the only persons who have exercised any control over the property, to your knowledge, since Mr. Tayloe's death?

A. The only ones, sir.

Q. I will ask you to state whether or not you are the same John W. Paine mentioned in the answer in this suit as being a defendant in several ejectment suits brought for the recovery of a part of this square.

A. I am.

Q. Did you have any knowledge of the value of real estate in the city of Washington in or about the years '68, '69, '70, and thereabouts?

A. Well, not very much knowledge.

Q. Did you have any knowledge?

A. Well, yes; some knowledge.

Q. Did you have any dealings in Washington real estate?
73 A. I have bought some real estate in Washington.

Q. Then you are not able to state what was the value of this property at that time?

A. Yes, sir; I can state. At what time?

Q. You say you have no knowledge of values at that time, '68 and '69?

A. No; I have no knowledge.

Q. Do you know the present value of square 53 and its improvements?

A. I know what I consider them worth.

Q. Will you please state what that amount is?

Mr. MACKEY: I object to the question as incompetent. The witness is not an expert, disclaiming to be an expert as to the values of real estate in Washington city.

A. I consider the ground and the buildings to be worth two hundred and fifty thousand dollars.

Mr. MACKEY: The answer is also objected to because the question is not what the witness considers the value of the property, but what its value is as matter of fact.

Q. I will ask you to state the ages of the other three defendants in this suit.

A. Shall I give the dates of their births?

Q. Very well; that will do.

A. My oldest child was born on the first of May, 1863; the second one, the next one, on the 24th of September, 1869; the remaining one on the 4th of February, 1872, just three weeks prior to the death of my wife.

Q. Did you know Mrs. Minnie Hunt Ransom?

A. No, sir.

Q. Did you know Robert Ransom, her husband?

A. No, sir.

74 Q. Do you know any of the plaintiff's in this suit?

A. I do not.

Mr. JOHNSON: I think that is all.

Cross-examination by Mr. FRANKLIN H. MACKEY:

Q. I understood you to say that prior to the erection of these twenty-two houses upon this square 53 that the property was vacant property—unoccupied?

A. Yes, sir. When the wood and coal yard was there the man may have had a wooden shanty on it for an office, like; but the man I spoke of, who occupied it to make pavements, I think, had nothing. His office was down opposite the Treasury, near Riggs & Company's bank; but when the wood yard occupied it there was coal and wood in there. He may have had a wooden shanty in there for an office. I don't know that he did have, but he may have.

Q. After the division or partition of the estate of Benjamin Ogle Tayloe how long was it before you rented the property to any one?

A. How long after the division of the property?

Q. Yes.

A. I could not say; it is too long ago.

Q. Can you approximate whether it was five, six, or ten years?

A. I rented it within ten years, surely—within ten years from the time it became my wife's; whether it was one or two, five or six years I cannot say, but I will swear that I rented it within ten years.

Q. You did not use it for any purpose until you did rent it, did you?

A. No.

Q. Are you able to say that you did not use it for three or four or five years after the property was partitioned to your wife?

A. Well, sir, I must repeat my answer. I could not
75 specify the year. I swear that I rented it within ten years, but I won't swear any nearer than that.

Q. Within ten years from this date?

A. No, sir. Your question was, How long after the division was made that I rented it. I replied that I would not swear to the year, but I would swear that I rented it within ten years.

Q. Ten years from when?

A. Ten years from the time of the division. Within ten years from the time it became my wife's property I rented it.

Q. If you rented it one month after the property was partitioned and set off to your wife that would be within ten years, so that the answer is not definite. I want to come within some reasonable period—a year, two, three, or four years.

A. I have answered your question. I would not swear how soon after the property became my wife's I rented it; but I would swear that I rented it within ten years from the time it became her property. So I can't vary that. I don't remember back twenty-five years very well.

Q. You see the vagueness of that answer. To say that you rented it within ten years might mean that you rented it a month after it was partitioned to your wife, or it might mean that you did not rent it for nine years and nine months.

A. You must take the answer just as I give it.

Q. You are unable to say with any degree of definiteness?

A. Let me repeat my answer. Your question was, How soon after the property was divided from the estate of Benjamin Ogle Tayloe—how soon after that division I rented it. I replied that I would not swear how long a time elapsed after the division that I rented it; but I would swear that I rented it within ten years. There is no use in my repeating it, and I won't vary the
76 answer.

Q. To whom did you rent it first?

A. Well, I would not swear that either; I cannot say to whom I rented it first.

Q. To how many persons have you rented it?

Mr. JOHNSON: You speak now before the houses were built?

Q. Before the houses were built, I mean.

A. I cannot say how many persons.

Q. I understood you to say that you rented it to a man——

A. (Interrupting.) For a coal and wood yard and to a man to make pavements, but I will not swear that I did not rent it to others. That is what you ask me to swear to?

Q. Yes.

A. I will not swear that.

Q. Do you know the name of this party to whom you rented it to make pavements?

A. If you would tell me a lot of men who made pavements as long ago as that perhaps I could.

Q. Barbour?

A. No; it was not Barbour. He had an office in the basement

of a building south of Riggs & Company's bank. If you would mention the name I could recall it.

Q. You say he had an office at that time near Riggs's bank?

A. I think I will not swear, but I think he had an office in the basement of a building near Riggs' bank. I don't know that I ever saw the man.

Q. Did you ever see him in the occupation of the place yourself?

A. Oh, yes; I saw that it was occupied, making this pavement.

Q. How long did he occupy it?.

A. He occupied it quite a long while—several years, I think.

Q. Two or three years?

A. I would not say how many.

Q. You would not say whether it was two or three or five
77 or six?

A. No, sir.

Q. Did the wood and coal yard man occupy before that or afterwards?

A. The wood and coal fellow, Tumelty, was the last tenant up to the time it was improved.

Q. How long after this pavement man vacated the property was it before you rented it to this wood and coal man?

A. I don't know.

Q. Could you say it was two years or three years?

A. No; I would not say the years. I will say it was several years.

Q. You are unable, I understand you to say, to state what other persons occupied this property besides this pavement man and this wood and coal man?

A. I am unable to say who occupied it besides those two.

Q. Did anybody occupy it in the interval between the time when the pavement man vacated and the wood and coal man took possession?

A. That I could not say.

Q. You did not rent it to any one in the interval?

A. I never rented it at all. My Washington agent rented it for me.

Q. Who was the agent?

A. I had two agents in Washington. First I had an old man by the name of Towles. He was the agent of Mr. Ogle Tayloe in his life, and then after the division he was my agent for quite a while. Then Towles got old and sent for me and said he was getting old and he didn't think he was doing justice in looking after the property and I had better get another agent. Then I made Thomas E. Waggaman my agent. Then I made B. H. Warner & Company the agent.

Q. The contract of rental with this pavement man and this wood and coal man was made through your agent?

A. Yes, sir.

Q. Did you ever have the title to this property examined?
78 A. To get an abstract?

Q. An abstract of title.

A. I have.
Q. Whom did you employ to make an abstract?
A. Mahlon Ashford.
Q. Did he report the title to you as perfect?
A. He did, without a cloud.
Q. Did you not at one time employ Messrs. Gordon & Gordon as your attorneys in reference to this property?
A. Never.
Q. Did you not at one time, through some attorney, endeavor to get a quitclaim from the Ransom heirs to this property?
A Never; never heard of the Ransoms until this suit was begun or the former suits.
Q. You have never resided in Washington within the past ten years?
A. What do you call residing?
Q. Making Washington your home.
A. Never.
Q. How long did this wood and coal man occupy this property before you began to build upon it?
A. I could not say.
Q. You can't approximate to the time—one, two, or three years?
A. How long he occupied it prior to my improving it?
Q. Yes.
A. No, no; I could not say that.
Q. Can you state how long after he vacated the property it was before you began to make the improvements?
A. Very soon. I think I hurried him off; tried to.
Q. What do you mean by "very soon"? That is a comparative term. How long after this wood and coal man vacated the property was it before you began to make your improvements?
A. Soon.
Q. What do you mean by that—a year?
A. I could not say.
79 Q. Do you mean six months?
A. I could not say.
Q. Do you mean one month?
A. No; I did not begin to build within one month after he left.
Q. Well, two months?
A. No; I would not locate it beyond a month. It is too long ago for me to remember.
Q. I will make another effort to get a little more definite answer to my other question. Would you say that the property remained vacant two years after it was set off to your wife before you rented it to this pavement man?
A. That I could not say. You asked me once and I told you I would swear it was within ten years, but I would not swear any nearer.
Q. I understand you, but I want to get it a little more definite than ten years. I have tried to explain to you that "within ten years" may mean that you rented it a month after it was set off to your wife or that you did not rent it until nine years and nine

months after. Now, I ask you whether or not you are able to say that that property was rented to this pavement man within five years after the property was set off to Mrs. Paine.

A. I will not say.

Mr. MACKEY: That is all.

Redirect examination by Mr. JOHNSON:

Q. Can you remember whether or not this property was rented at any time during your wife's lifetime?

A. No; I do not think it was.

Q. You have stated that you cannot recall any other tenants than the man engaged in the paving business and the wood and coal man; can you say that there were no other tenants?

A. No, sir; I cannot say that.

80 Q. Do you know the first name of Mr. Towles?

A. James; James Towles.

Q. Do you know whether he is now living or not?

A. Oh, he is dead. He has a son (or had some time ago) in the furniture business.

Q. H. O. Towles?

A. I think that is James Towles' son. I would not swear that he is the son, but I think he is.

Q. You think H. O. Towles, in the furniture business, is the son of this man?

A. I think so.

Q. You have said several times, in response to questions of Mr. Mackey, that you would not swear positively to certain things. Do you mean by that that you would not answer his questions or that you could not distinctly recall?

A. That is what I mean—that I could not distinctly recall.

Q. Have you any objection to answering any of his questions as to which you can remember?

A. None whatever. I am entirely willing to give him any information I have.

Q. You stated that Mr. Towles, Mr. Waggaman, and Warner & Company had acted as agents for you in the renting of this property. Did they act as your agents in that order—that is, Towles first, Waggaman next, and then Warner & Company?

A. Yes, sir; that is the order.

Q. Who are the agents in charge of it now?

A. B. H. Warner & Company.

Q. I will ask you to state (a matter that I forgot on direct examination) whether the cost of building these houses was paid in cash or whether any of it is secured in any way on the property.

A. No, sir; it was paid in cash. There is not a lien on the property.

81 Recross-examination by Mr. MACKEY:

Q. Neither you nor your wife ever occupied this property yourselves until you began to improve it with these twenty-two buildings?

A. Do you mean whether I ever lived there—on the ground?

Q. Yes.

A. I never lived on the ground a moment.

Q. You never occupied it yourself?

A. No, sir.

Q. Nor did your wife?

A. No, sir.

Q. Nor your children?

A. No, sir.

(By Mr. JOHNSON:)

Q. Did any one else occupy it except the tenants of yours?

A. No, sir.

Q. Do you know that of your own knowledge—that is to say, the answer that you have just given Mr. Johnson as to the occupancy of this property by other persons than your tenants? Do you know of your own knowledge whether other people have or have not occupied that property?

A. Yes, sir; I do. I keep pretty good run of my Washington property. I have not visited square 53 every day since '69, but there has never been a tenant there but what I was cognizant of his being there.

Q. That is, on information from your agents?

A. Information of my agents.

Q. But it is possible that other people may have occupied this square during your absence from Washington and you not know it?

A. No, sir; it is not possible.

Q. How would you know it?

A. Either by my eyes or by my agents' information.

Q. And if you were not there your agents would have informed you?

A. The way that everybody else gets information—either by their eyes or from others.

82–84 Q. Is it not a fact that you have spent very little of your time in Washington during the past ten or fifteen years?

A. I have not been there a great deal of my time.

Examination concluded.

JNO. W. PAINE.

* * * * * * *

85 FANNIE MARIA GIBSON sworn.

Direct examination.

By W. G. JOHNSON, Esq.:

Q. Mrs. Gibson, are you the lady known as Fannie Hunt Gibson?
A. I am.
Q. Did you know Mrs. Minnie Hunt Ransom?
A. Yes, sir.
Q. Was she related to you?
A. Yes, sir; she was my only sister.
Q. Did you know her husband?
A. Very well.
Q. What was his name?
A. Robert Ransom.
Q. Did you know G. Gibson Hunt, of the United States Army?
A. Yes, sir.
Q. What relation is he?
A. My brother.
86 Q. Is he living?
A. Yes, sir.
Q. Where is he at present?
A. He is an officer of the army and is located at Fort Wingate, New Mexico.
Q. At the time of your sister's marriage to Mr. Ransom, what was his occupation?
A. He was an officer of the United States Army.
Q. Do you know where Mr. and Mrs. Ranson were, in what part of the United States, in the spring of 1859?
A. I think in Carlisle.
Q. Do you know where they went from here?
A. They went from here to Fort Lyon.
Q. Where was that?
A. I don't know where Fort Lyon was; it was somewhere in the northwestern part of the United States.
Q. Was it near or far from this section of the country?
A. Quite remote; very much more so than it would be now, as they did not have at that time the railroad facilities.
Q. Do you know Walter S. Cox, now justice of the supreme court?
A. Very well.
Q. How long have you known him?
A. All my life.
Q. Is he related to you?
A. Distant cousins.
Q. Do you know what were the personal relations between Judge Cox and your sister, Mrs. Ranson, during her lifetime?
A. Always most cordial.
87 Q. What were your relations with him?
A. Very cordial.
Q. Was he well acquainted with your sister and brother?
A. Very well.

Q. What were your relations as to agreeableness and cordiality with your sister, Mrs. Ranson?

A. Always very affectionate and cordial.

Q. Did you at any time have anything to do with your sister's, Mrs. Ranson's, money affairs in any way?

By Mr. MACKEY: Objected to as irrelevant.

A. I was always in the habit of spending money for her and doing shopping for her and her family.

Q. Can you state, Mrs. Gibson, over what period of time you attended to that sort of business for Mrs. Ranson?

A. During her single and a greater part of her married life.

Q. How long was it from the spring of 1859 to the close of the war and after?

A. Possibly I actually attended to more during the war. I was in the habit of sending things through the line to her. All my relatives were in the South, and I was in the *bait* of sending things quite frequently to my sister. General Ranson was one of the last officers to go out. I sent things during the war and after the war was over.

Q. During that time did you keep up a correspondence with your sister?

A. Constantly.

Q. You say you sent things to her and did shopping for her. Did you handle money for her?

88 A. Yes, sir; very frequently.

Q. I will show you some letters. They are marked Exhibit- W. S. C. No. 4, W. S. C. No. 5, W. S. C. No. 6, W. S. C. No. 7, W. S. C. No. 8, W. S. C. No. 9. (Letters shown witness.) I will ask you to look at these letters and state in whose handwriting they are.

—. I know the handwriting very well. They are all in the handwriting of Judge Walter Cox.

Q. To whom are they addressed?

By Mr. MACKEY: Objected to; the letters will show for themselves.

A. All addressed to myself.

Q. I will ask you to state whether or not the money mentioned in these letters of Judge Cox as belonging to your sister, Mrs. Ranson, was paid to you by Judge Cox.

By Mr. MACKEY: Objected to on the ground of irrelevancy and immateriality.

A. I am sure he did.

Q. I will ask you to state whether or not you paid that money over to Mrs. Ransom or for her account in any way.

By Mr. MACKEY: Objected to as immaterial and irrelevant.

A. It was either paid over to her or spent for her at her direction.

Q. By whom?
A. By myself, as well as I can possibly remember.
Q. You stated that you had expended money for your sister, Mrs. Ransom, for a considerable period of her whole life. Did
89 you keep any memorandum of these expenses?
A. None whatever except just at the moment.
Q. Did you keep these memoranda?
A. No, sir.
Q. Whatever became of them?
A. I suppose they were destroyed.
Q. When did you- sister die, what year?
A. I cannot say positively.
Q. Was it after the war?
A. Several years after the war.
Q. When did you first see your sister after the war?
A. I met her in Richmond immediately after the war, in the year 1865 She died in 1879 or 1880; I am not positive which, as I have a poor memory for dates.
Q. Had you seen her soon after that?
A. I returned with her to North Carolina. I think she was in Washington for two or three weeks, and then I returned with her to North Carolina.
Q. Did you know her husband well?
A. Very well..
Q. What were your personal relations with him during your sister's lifetime?
A. Always very cordial.
Q. Did you meet him after the war?
A. Yes, sir.
Q. Did these friendly relations continue?
A. Aalways.
Q. I will show you, Mrs. Gibson, a paper which has been
90 offered in evidence in this cause, marked Exhibit W. S. C. No. 3 (paper shown witness by counsel), and ask you to look at the signature G. G. Hunt, and state if you know in whose hand-writing that is.
A. It is in the handwriting of my brother, Colonel G. Gibson Hunt.
Q. Did you ever see your brother write?
A. Repeatedly.
Q. Did you ever correspond with him?
A. Constantly.
Q. Are you familiar with his handwriting?
A. Perfectly.
Q. Mrs. Gibson, I will now show you a paper which has been offered in evidence in this cause, marked Exhibit W. S. C. No. 2 (paper shown witness by counsel), and ask you first if you have ever seen your brother-in-law, Robert Ransom, write.
A. Very often.
Q. Did you ever correspond with him?
A. Constantly.

Q. Do you know his handwriting?
A. Perfectly.
Q. Did you ever see your sister, Mrs. Ransom, write?
A. Frequently.
Q. Have you corresponded with her?
A. Yes, sir.
Q. Do you know her handwriting?
A. Yes, sir
Q. I will ask you now to look at the signature of Robert Ransom, Jr., and M. H. Ransom, on this Exhibit W. S. C. No. 2, and state whether or not the signature of Robert Ransom, Jr., is
91 the signature of your brother-in-law.
A. Most assuredly.
Q. And the signature M. H. Ransom—signature of your sister?
A. I think it is.
Q. I will ask you now to look at the paper attached to Exhibit W. S. C. No. 2, which is in evidence in this cause and is marked W. S. C. No. 1, and state in whose handwriting the body of that paper is.
A. In the handwriting of Judge Cox.
Q. I will ask you to look at the signature of G. Gibson Hunt on W. S. C. No. 1 and state if you know whose handwriting that is.
A. That is my brother's handwriting.
Q. Did you know A. L. Sponsler?
A. Very well.
Q. Do you know whether or not he was acquainted with your sister and your brother-in-law, Mr. and Mrs. Ransom?
A. He knew them very well.
Q. Did you know President Judge James H. Graham, of the 9th judicial district of Pennsylvania?
A. I knew him from sight; just a speaking acquaintance.
Q. Do you know whether or not he knew your sister, Mrs. Ransom, and her husband?
A. I really do not know.
Q. What was his reputation and character as a man of probity?
A. Very good.

By Mr. MACKEY: This question is objected to as immaterial and not the proper method to prove character.

Q. I forgot to ask you whether or not you received your
92 brother's share of the money mentioned in Judge Cox's letters.
A. It was paid to me. My husband invested it.
Q. Did you receive your own share?
A. Most certainly.
Q. Do you know whether or not Judge Cox was a professional man from 1859 to 1865?
A. He was a lawyer practicing at the bar.
Q. Where?
A. In Washington city and in Georgetown. I think he was residing in Georgetown then.

Q. Was that fact known to your sister, Mrs. Ransom, and her husband?

By Mr. MACKEY: Question objected to as irrelevant.

A. Perfectly.

Q. Do you know what were the personal relations between your sister, Mrs. Ransom, and your brother, Colonel Gibson Hunt, in the years 1859, 1860, and on through?

By Mr. MACKEY: Question objected to as irrelevant.

A. Most amicable and affectionate.

Q. Did they remain so?

A. Yes, sir; throughout their lives.

Cross-examination by Mr. MACKEY:

Q. Do you remember, Mrs. Gibson, when this money that you say Judge Cox sent you was received by you?

A. No, sir; I do not.

Q. Was it during the war?

A. It was just at the close of the war, I think.

Q. Do you remember what the amount was?

A. Something over seven hundred dollars, I think.

93 Q. What did you say you did with that money?

A. My sister's portion?

Q. Yes.

A. It was all expended at her direction or turned over to her.

Q. She was where at that time?

A. Warrenton, North Carolina.

Q. Did you send any to her during the war?

A. I don't think so.

Q. Did you have any communication with your sister with regard to this property during the war?

A. I have no recollection of it at all. I know there never was any question about it.

Q. I don't mean with regard to the seven hundred dollars; I mean in regard to the property.

A. I never spoke to her on the subject. I do remember that the property was sold at the suggestion of General Ransom and for their benefit.

Q. That was during the war?

A. Before the end of the war; it was sold in good faith. It was sold more specially for the benefit of General Ransom's family. It was unimproved property, and the taxes were eating it up.

Q. It was, then, just because you- family supposed at that time that General Ransom and his wife, Mrs. M. Ransom, were in need of this money that the property was sold?

A. Well, yes. I think his expenses were very high and he wanted money.

94 Q. At that time he was an officer in the Confederate army?

A. I am talking of the time the power of attorney was given.

Q. At the time it was sold he was an officer in the Confederate army?

A. Yes, sir; at the time the power of attorney was given he was an offier in the regular army.

Q. Do you know when Mrs. Ransom first heard this property was sold?

A. I do not remember dates at all.

FANNIE M. GIBSON.

JOHN HAYS, Esq., sworn.

Direct examination.

By W. G. JOHNSON, Esq.:

Q. What is your business?

A. Practicing lawyer.

Q. Where?

A. Here in Carlisle, Pa.

Q. How long have you lived here?

A. I have lived here since I was born.

Q. How long ago was that?

A. Fifty-odd years.

Q. I show you a paper which has been offered in evidence in this cause and which is marked W. S. C. No. 2 and ask you to look at it and ask you to state if you know in whose handwriting the body of that paper is.

A. In the handwriting of A. L. Sponsler.

Q. Who was he?

95 A. A justice of the peace and notary public and real-estate agent.

Q. Where?

A. Carlisle, Pa.

Q. Did you ever see him write?

A. Very often.

Q. Have you had any connection with him in his business?

A. I knew him intimately for twenty years. I knew him for thirty years during his lifetime and was his executor.

Q. I will ask you to look at the name signed to this paper (handing paper to witness) as attesting witness, A. L. Sponsler, and state if you know his signature.

A. It is the handwriting of A. L. Sponsler.

Q. Do you know the reputation of Mr. Sponsler in this community for probity.

By Mr. MACKEY: Question objected to as incompetent and also because the reputation and character is not in question, and if it were it is not the proper way to prove it.

A. The very best.

Q. Did you know President Judge J. H. Graham?

A. Yes, sir.

Q. Did you ever see him write?

A. Very often.
Q. Do you know his signature?
A. I do. That is his signature as witness to this paper.
Q. Will you look at the signature on the end of the certificate and acknowledgement and state if that is his?
A. Yes, sir; that is his signature.
96 Q. What was he on the 24th May, 1859?
A. He was president judge of this judicial district—the 9th Pennsylvania—comprising Cumberland, Perry, and Juniata counties.
Q. Do you know what was his reputation in this community for probity?
A. He stood very high. He was twenty years president judge.
Q. Did you know Phillip Quigley at that time—May, 1859?
A. Yes, sir.
Q. What office did he occupy?
A. Without looking at that paper my recollection is he was deputy prothonotary.
Q. Did you ever see him write?
A. Yes, sir.
Q. Do you know his signature?
A. I do.
Q. Will you look at the signature of Phillip Quigley on that certificate and state whether that is his?
A. It is.
Q. You have stated that Mr. Sponsler is dead and that you are his executor. Do you know whether Judge Graham is living or dead?
A. Dead.
Q. How long has he been dead?
A. I would suppose at first blush that Judge Graham had been dead about ten years.
Q. Is Mr. Quigley living or dead?
A. He is dead—dead a good many years ago.

Cross-examination by Mr. MACKEY:

Q. Were you of age May, 1859?
97 A. Yes, sir; I was born in 1837, and in May, 1859, I was over 22.
Q. The familiarity which you have with the signatures of these gentlemen occurred since 1859?
A. Both before and after. I tried some cases before Mr. Sponsler before I was admitted to practice.
Q. Did you know the signatures of these gentlemen in 1859? Could you have identified them at that time?
A. Yes, sir; unquestionably. Judge Graham was a distant relation, and I have known him for many years prior to that time. I had known Mr. Sponsler quite a number of years before that time.

JOHN HAYS.

Hon. R. M. HENDERSON sworn.

Direct examination.

By W. G. JOHNSON, Esq.:

Q. Will you please state your occupation and residence?
A. Lawyer; Carlisle, Pennsylvania.
Q. How long have you resided in Carlisle?
A. I was born within a mile of Carlisle, and would think I have lived in Carlisle since 1853, except probably eight years that I was a resident of the Dauphin district. Practically I have lived here all my lifetime.
Q. Were you living in Carlisle in the spring of 1859?
A. Yes, sir.
Q. Did you know A. L. Sponsler?
A. Very well, sir.
Q. Did you know President Judge J. H. Graham?
A. Very well.
98 Q. Do you know Phillip Quigley?
A. Yes, sir.
Q. Did you know them at that time?
A. Yes, sir.
Q. Had you at or before the spring of 1859 ever seen these gentlemen write?
A. Both before and after, frequently.
Q. Did you know the signatures of these gentlemen?
A. Yes, sir.
Q. I will ask you to look at a paper porporting to be the signature of witness to Exhibit W. S. C. No. 2, in evidence in this cause, and state in whose handwriting they are.
A. J. H. Graham is in the handwriting of Judge Graham; A. L. Sponsler is in the handwriting of A. L. Sponsler.
Q. Look at what purports to be the signature of Phillip Quigley, prothonotary, and state whose signature.
A. I should say the handwriting of Phillip Quigley.
Q. Further on there is the name of J. H. Graham; whose signature is that?
A. The signature of James H. Graham, forme-ly the president judge of this district.
Q. Did you know Judge Graham and Mr. Sponsler well?
A. Yes, sir; very well.
Q. Do you know what their reputation for probity of character was in the community in which they lived?
A. Yes, sir; both were men of unquestionable character.

By Mr. MACKEY: This is objected to as not the proper method of proving character.

99–102 Q. Did you know Robert Ransom, Jr.?
A. Yes, sir; I knew him when he was an officer here at the barracks.
Q. Where were the barracks?

A. Partly in the borough, partly in the adjoining township.

Q. Did you know his wife?

A. Yes, sir; I did.

Q. Do you know whether or not Judge Graham and Mr. Sponsler were acquainted with them?

A. I should suppose so. I am satisfied Judge Graham was acquainted with Mrs. Ransom. Miss Hunt visited here very frequently before their marriage and no doubt visited with Judge Graham's daughters in the same society. She visited at Judge Gibson's at the time.

Q. Was that Judge Bannister Gibson?

A. Yes, sir.

Q. Do you know whether or not Judge Graham and Mr. Sponsler had opportunities of knowing them?

A. They certainly had. They were both here sometimes. The one visited here quite frequently.

R. M. HENDERSON.

* * * * * * *

103 WASHINGTON, D. C., *April* 23, 1894—1 o'clock p. m.

Met pursuant to agreement.

Present: Franklin H. Mackey, Esq., solicitor for complainants; William G. Johnson, Esquire, solicitor for defendants; also the examiner, Oscar Luckett, and Judge WALTER S. COX, an associate justice of the supreme court of the District of Columbia, who, being produced as a witness, of lawful age, for and on behalf of the defendants, and being first duly sworn, did depose and say as follows:

Direct examination.

By Mr. JOHNSON:

Q. Judge Cox, you were residing in the District of Columbia prior to 1865 and during that time continuously up to the present time?

A. Yes, sir.

Q. Did you know Minnie Huntt Ransom, the wife of Robert Ransom?

A. Very well.

Q. Will you please state whose daughter she was?

A. She and Mrs. Gibson and Gibson Huntt were children of a former Dr. Huntt, of Washington, quite well known in his day; I think he died, though, before I grew up. They were very distant connections of mine.

Q. Did you also know Mrs. Fannie Gibson, the sister of Mrs. Ransom?

A. Oh, yes.

104 Q. And did you know George Gibson Huntt—now Colonel Huntt?

A. Yes. These children were taken charge of by an old gentleman, George Gibson, who was quartermaster general, after the death of Dr. Huntt, whose intimate friend he was, and he brought

the children up and educated them. Gibson Huntt was named after him, and Fannie Huntt afterward married Colonel Gibson, of the army.

Q. How well were you acquainted with them from, say, 1860 up to 1865 or 1866?

A. I knew them very intimately. Fannie Huntt lived at my uncle's, Richard Smith.

Q. That is the one who is now Mrs. Gibson?

A. Yes, sir. Minnie Huntt, who married Ransom, was at one time in the convent at Georgetown. She lived there for several years, and she also lived at my house.

Q. Prior to her marriage to Mr. Ransom?

A. Yes.

Q. How well did you know Colonel George Gibson Huntt?

A. I did not know Gibson so well as the others; I saw very little of him, but knew him.

Q. I will ask you to state, Judge Cox, whether Mrs. Ransom, Mrs. Gibson, and Colonel Gibson Huntt were persons of probity, integrity, and of high character.

A. Oh, yes.

Q. Will you please look at these two papers which I hand you (handing papers to witness) and state in whose handwriting the body of these papers is?

A. My handwriting.

105 Q. Will you please state what they are?

A. One is a conveyance by George Gibson Huntt of his interest in certain lots of ground to Benjamin Ogle Tayloe; the other is a contract by him as attorney for Mr. and Mrs. Ransom for the conveyance of Mrs. Minnie Ransom's interest in the same property to Tayloe. Attached to that contract is another paper executed by George Gibson Huntt——

Mr. MACKEY, interrupting: Mr. Johnson, don't you think the papers ought to speak for themselves? Are you going to put them in evidence? Let me see them.

Mr. JOHNSON: Yes; they will be put in evidence.

The WITNESS, continuing: To sell to Benjamin Ogle Tayloe is another paper purporting to be signed by R. Ransom, Jr., and M. H. Ransom.

Q. I will ask you to look at that paper and state if you know in whose handwritng the body of it is, and if you know these signatures (indicating).

A. No; I do not know in whose handwriting the body is. I never knew young Ransom's signature. He was then lieutenant. I knew Minnie's, though, but I have forgotten all about it.

Q. Can you say whether or not that is her signature?

A. I cannot say that from my recollection. I only know in my letters I allude to power of attorney from Mr. and Mrs. Ransom. I mean in my letters to Mrs. Gibson. Let me see which letter it is.

Q. I observe, Judge Cox, in the paper which you identify as in your handwriting and which purports to be executed by George

Gibson Huntt, that that recites, among other things, the
106 following: "I, George Gibson Huntt, by virtue of the annexed power of attorney to me from R. R. Ransom, Jr., and Mary Ransom, his wife," and ask you to look at the two papers and state whether, upon reflection, you can say that that paper purporting to be signed by Robert Ransom and M. H. Ransom is the power of attorney referred to in the instrument written by you.

A. I have no doubt it is the same paper.

Mr. JOHNSON: I now offer in evidence in behalf of the defendants both of the papers which have been identified by Judge Cox, including the paper purporting to be a power of attorney annexed to one of them. The said papers are marked by the examiner for identification "Defendants' Exhibits W. S. C. Nos. 1, 2, and 3," respectively.

Mr. MACKEY, solicitor for complainants: I object to these papers on the ground that they are not sufficiently proven; that the alleged power of attorney by Robert Ransom, Jr., and wife to George Gibson Huntt, annexed to the paper purporting to be an execution of that power, is not sufficiently identified, and also because the alleged execution of the power shows on its face that it is not an execution of the power, and also the paper purporting to be a deed personally from George Gibson Huntt to Benjamin Ogle Tayloe has not been sufficiently proven—the execution thereof has not been sufficiently proven.

The WITNESS: On the question of the identity of that power of attorney perhaps I might make further statement. In my letter to Mrs. Gibson Huntt, dated November 26th, 1864——

Mr. MACKEY: Counsel for the complainants objects to the reading of this paper as not evidence, it being a letter to a third
107 party not a party to this suit.

The WITNESS, continuing: I say, "Mr. Tayloe has paid me Gibson's share in a check which I enclose endorsed to your order, and has agreed to pay Minnie's share as soon as Gibson will execute a formal contract of sale in pursuance of the power of attorney from her and her husband. I enclose a paper attached to the power of attorney which he should execute in the same way as his deed, and as soon as I receive it I will send you Minnie's share." That shows that I sent the paper for him to execute, and if they came back together that is the identical power of attorney which I had.

Q. Judge Cox, at the time that you wrote this paper for execution by George Gibson Huntt as the attorney of Mr. and Mrs. Ransom, in what profession were you engaged?

A. I was than a member of the bar.

Q. Were you practicing law here?

A. Yes.

Q. Did you at or about that time act as the counsel of Mrs. Fannie Huntt Gibson, of George Gibson Huntt, and of Minnie Huntt Ransom?

A. I did, at their request, perhaps I should say at the immediate

request of Mrs. Gibson, effect a sale of some property for them that they owned in Washington and received the money and remitted it to Mrs. Gibson. Apart from my letters I would not remember the date, property, or purchaser.

Q. Did you sell to Benjamin Ogle Tayloe square fifty-three?

A. I sold him the property to which these letters of mine
108 refer. I do not remember the number of the square or the property described in these papers prepared by me. I do not remember the number of square and lots.

Q. Will you look again at this paper, which you state is in your handwriting, executed by George Gibson Huntt, and state from that whether or not you sold square fifty-three?

A. Looking at the paper prepared by me for execution by George Gibson Huntt, as attorney for Mr. and Mrs. Ransom, and also the conveyance to be executed by him, I can testify that square fifty-three was a part of the property which I sold for them.

Q. Will you please look at these papers (handing papers to witness) and state in whose handwriting they are and what they are?

A. These papers are five letters written by me to Mrs. Fannie Gibson in relation to the sale of the property described in the papers just now referred to.

Mr. JOHNSON, solicitor for defendants: I offer these letters in evidence in behalf of the defendants. The same are marked by the examiner for identification "Defendants' Exhibits W. S. C. Nos. 4, 5, 6, 7, 8, and 9" respectively.

Mr. MACKEY, solicitor for complainants: The offering of these letters in evidence and the letters are objected to on the ground that they are *res inter alios acta*.

Q. I will ask you, Judge Cox, to state whether in the sales which you made to Benjamin Ogle Tayloe and the sale of square fifty-three the purchase-money was paid by Benjamin Ogle Tayloe.

A. It was.

109 Q. To whom was it paid?

A. Paid to me.

Q. Was that sale made by you to Benjamin Ogle Tayloe a fair and *bona fide* sale in every respect?

A. I think it was.

Q. Was the price obtained a fair value for the property at that time?

A. Well, I thought so. It was the best I could get.

Mr. MACKEY, solicitor for the complainants: I object to the question and answer as irrelevant, the question of the sufficiency of the price not being in issue here at all.

Q. Will you please state, Judge Cox, what you did with the purchase-money paid to you by Benjamin Ogle Tayloe?

Mr. MACKEY, solicitor for complainants: All this testimony in relation to the purchase price of this property, the amount and what was done with it, is objected to as irrelevant and immaterial on the ground that it, is not in issue in this case, whether the property was

paid for or not or whether Mrs. Ransom received the purchase-money or her share or any part of it. It is immaterial whether she did or did not.

The WITNESS: It appears from my letter of July 27, 1864, that on that day I sent to Mrs. Gibson a draft for her share of the money of the proceeds of sale. It appears in my letter of November 26, 1864, that on that day I sent to Mrs. Gibson her brother's share of the proceeds, and, furthermore, by my letter of January 7, 1865, that I sent to Mrs. Gibson on that day her sister Minnie Ransom's share of the proceeds.

Q. At the time of January 7, 1865, when you sent to Mrs.
110 Gibson Mrs. Ransom's share of the purchase-money, did you know where Mrs. Ransom was?

A. I think she was at the South, and had not come up to the North. Her husband was in the Confederate service.

Q. And she was within the territory then in the occupation of the Confederate government?

A. Yes.

Q. Where was Mrs. Gibson at that time?

A. She was at Wilkes Barre, in Pennsylvania; my letters are addressed to her there.

Q. These letters, Judge Cox, which you have identified as being in your handwriting and which you have used for the purpose of refreshing your recollection of these matters, are they original letters sent to Mrs. Gibson or copies?

A. They are original letters. Mr. Appleby brought them to me, having procured them from Mrs. Gibson, as I understood.

Q. Will you please state when it was these letters were brought to you by Mr. Appleby or about when?

A. They seem to have been enclosed in an envelope directed to me by Mrs. Gibson. I may have been wrong in stating that Mr. Appleby brought them to me; they may have been sent to me by Mrs. Gibson in that envelope. I cannot see the postmark.

Q. Can you approximate it from your recollection?

A. No; I cannot. It was in connection with this controversy.

Q. Was it since the litigation?

A. Yes; either since the suit began or suit was threatened; some time within the last two or three years. I cannot say certainly whether Appleby brought them to me or whether they were
111 forwarded by Mrs. Gibson; I think the latter, from finding them in this envelope.

Q. Do you know, Judge Cox, what was the cause for Mr. and Mrs. Ransom, in 1859, making the power of attorney to Mrs. Ransom's brother?

Mr. MACKEY, solicitor for complainants: I object to the question as irrelevant. If the power of attorney was made it is immaterial what the occasion was, and if no power of attorney was made it is immaterial.

The WITNESS: I do not remember the exact date of Mrs. Ran-

som's marriage. Mr. Ransom was then in the United States Army. He did not live here, and I think was stationed in the West—probably he was in the cavalry—and it was probably with a view of an expected absence from the District. Whether it was that—I think it must have been that; it was too early then to anticipate the war. I think because he was in the Government service and expected to be absent from Washington.

Q. Did you ever see Mrs. Ransom at any time after January, 1865?

A. Yes.

Q. Did you ever see her husband?

A. No; she came here after the war was over in search of employment.

Q. She did or he?

A. She. Well, in the first place, to ask for his pardon, I believe—I do not remember now—and to endeavor to get some employment for him or herself. I saw her, I am sure.

Q. Were your relations with Mrs. Ransom always pleasant?

A. Yes.

Q. Was there ever any reference to the subject of this
112 sale by her to you or you to her?

Mr. MACKEY, solicitor for complainants: Question objected to as irrelevant and immaterial.

A. I have no recollection at all.

Q. Have you ever seen George Gibson Huntt since then?

A. Yes; one summer he occupied Judge Nott's house, two doors from me; I saw him then.

Q. How recently was that?

A. It must have been twelve years ago or longer.

Q. Did either Mrs. Ransom or her husband in their lifetime make any objection or complaint to you of the sale of this property or dispute the validity of that transaction?

Mr. MACKEY, solicitor for complainants: Question objected to as immaterial and irrelevant because it appears that Mrs. Ransom was at that time a *feme covert*.

The WITNESS: No.

Mr. JOHNSON: I believe that is all, Judge Cox.

Cross-examination.

By Mr. MACKEY:

Q. I only want to ask you one or two questions now; I want to read these letters and some questions may grow out of them, but I won't put you to this trouble now. This power of attorney—the alleged power of attorney which has been offered in evidence here—have you any recollection of that paper independent of the paper itself?

A. No—that is, I do not recollect independent of seeing the papers and seeing my allusions to it in my letters.

Q. Mr. Ransom, the husband of Mrs. Ransom, I believe you stated, was in the Confederate service; he was an officer during the war?

113 A. Yes.

Mr. MACKEY: That is all I can ask today and until I read these letters; if I desire to ask anything further we will consult the Judge's convenience.

WALTER S. COX.

Subscribed and sworn to before me this 20th day of October, 1894.

OSCAR LUCKETT, *Examiner.*

WASHINGTON, D. C., *May* 26, '94.

Mr. Mackey, solicitor for complainants, announces that he has no further questions to ask of the preceding witness, Judge Cox.

OSCAR LUCKETT, *Examiner.*

114 And I further certify that at a subsequent session, held pursuant to agreement of counsel, the followings proceedings were had:

WASHINGTON, D. C., *October* 19, 1894—2 o'clock p. m.

Met, pursuant to agreement, at office of William G. Johnson, Esquire, in the Fendall law building, 344 D street N. W.

Present: Franklin H. Mackey, Esquire, solicitor for complainants; William G. Johnson, Esquire, solicitor for the defendants, and Oscar Luckett, the examiner.

Whereupon the following proceedings took place:

Mr. JOHNSON, solicitor for the defendants: I here offer in evidence and will read at the hearing of this case the record and proceedings in the case of Ransom *vs.* Paine, No. 29908, docket 34 of the law dockets of this court.

Mr. MACKEY, solicitor for the complainants: I object to the introduction of this record and will object to the reading of it at the hearing on the ground that the same is irrelevant and immaterial to any of the issues in this case.

Mr. JOHNSON, solicitor for the defendants: I here offer in evidence and will read at the hearing the record and proceedings in the case of Williams *et al.* against Paine *et al.*, No. 31641, docket 36 of the law dockets of this court.

Mr. MACKEY, solicitor for complainants: I object to the introduction of this record and will object to the reading of it at the

115 hearing on the ground that the same is irrelevant and immaterial to any of the issues in this case.

Mr. JOHNSON, solicitor for defendants: I now offer in evidence and will read at the hearing of this case the record and proceedings in the case of Williams *et al. vs.* Paine *et al.*, No. 32845, docket 37 of the law dockets of this court.

Mr. MACKEY, solicitor for the complainants: I object to the intro-

duction of this record and will object to the reading of it at the hearing on the ground that the same is irrelevant and immaterial to any of the issues in this case.

Mr. JOHNSON, solicitor for the defendants: I now offer in evidence a certified copy of the deed from the corporation of Washington to Benjamin Ogle Tayloe, dated June 20, 1864, recorded June 21, 1864, in Liber N. C. T. 37, folio 138, of the land records for the District of Columbia, and will read the same at the hearing of this case. (NOTE.—The certified copy of the deed last above mentioned is marked by the examiner for identification Defendants' Exhibit No. 10.)

Mr. MACKEY, solicitor for the complainants: I object to the introduction of the above deed and will object to the reading of it at the hearing on the ground that the same is irrelevant and immaterial to any of the issues in this case.

Mr. JOHNSON, solicitor for the defendants: I also offer in evidence and will read at the hearing of this case certified copy of the last will and testament of Benjamin Ogle Tayloe, dated July 116–124 21, 1856, and the last codicil thereto, dated November 19, 1867, both probated July 11, 1868, and recorded in Will Book 11, folio 119, of the records of the office of the register of wills for the District of Columbia. (NOTE.—The certified copy of the will and codicil last above mentioned is marked by the examiner for identification Defendants' Exhibit No. 11.)

Mr. MACKEY, solicitor for complainants: I object to the introduction of the above will and codicil and will object to the reading of the same at the hearing on the ground that they are immaterial and irrelevant to any of the issues in this case.

Mr. JOHNSON, solicitor for defendants: I now offer in evidence and will read at the hearing of this case certified copy of a deed from Phœbe W. Tayloe, Eugenia P. Warren *et vir*, and E. T. Tayloe to Julia Dickinson Paine, dated November 17, 1870, recorded December 13, 1870, in Liber 633, folio 278, of the land records for the District of Columbia. (NOTE.—The certified copy of the deed last above mentioned is marked by the examiner for identification Defendants' Exhibit No. 12.)

Mr. MACKEY, solicitor for complainants: I object to the introduction of the above deed and will object to the reading of it at the hearing on the ground that the same is irrelevant and immaterial to any of the issues in this case.

Thereupon an adjournment was had without day.

OSCAR LUCKETT, *Examiner.*

* * * * * * *

125 EXHIBIT W. S. C. No. 4.

Filed October 27, 1894.

DEAR FANNIE: Mr. Tayloe has furnished me a statement showing—

Payment of taxes by him amounting to.....	$199 27
Which deducted from.....	2,500
Leaves a balc. of.....	$2,300 73

Each share of this—one-third—would be $766.91. I thought he would pay one-half to you on receiving your deed & the balc. to Gibson; but he thought it better, and he is perhaps right, to pay each one of you his or her share on receiving the deed from each. He has therefore paid me your share and given me an authority to Mr. Riggs to pay the rest on receiving the deed. This will relieve you of any responsibility as to Minnie's share. I suppose you would be rather embarrassed about disposing of it, and she can do what she pleases with it when the war is over. I altered the recital in the deed as to the amount received. I have not yet received Gibson's deed. When it arrives I will get his share and dispose of it as he directs. I have paid $25 out of yours to the agent who negotiated the sale and send you a draft for the balc., $741.91, on New York, payl. to Capt. Gibson.

I have been much distressed at hearing very bad accounts from Clem. about his health & am about to write to him to come home.

Remember me to Capt. Gibson.

Yours affect-ly, WALTER S. COX.

July 27, 1864.

Mrs. Fannie M. Gibson, care Capt. Geo. Gibson, 35 Sunbury Str., Boston.

126 EXHIBIT W. S. C. No. 6.

Filed October 27, 1894.

DEAR FANNIE: Mr. Tayloe has paid me Gibson's share in a check, which I enclose, endorsed to your order, and has agreed to pay Minnie's share as soon as Gibson will execute a formal contract of sale, in pursuance of the power of attorney from her & her husband.

I enclose a paper attached to the power of attorney which he should execute in the same way as his deed, and as soon as I receive it I will send you Minnie's share.

Yours affect-ly, W. S. COX.

Nov. 26, 1864.

Mrs. Fannie H. Gibson, present.

127 EXHIBIT W. S. C. No. 7.

Filed October 27, 1894.

DEAR FANNIE: I returned home today from Balto. and found yours of the 31st ulto. with the papers to be executed by Gibson in due form.

I have seen Mr. Tayloe & collected from him the amount due on Minnie's share of the lots. I will explain about the agent. We very often employ a go-between to do the bargaining and chaffering in selling real estate, & can do better than by appearing directly in the business ourselves. In this case I think I got probably $500 more from Mr. Tayloe than I could have done in person. I promised the agent a fee, & though he wanted $100 I beat him down to $50. I reserved $25 out of your share & have since paid him the balance myself.

I did not intend to charge you anything for my services in the business, being glad to aid you in getting it settled, but as you seem anxious to have your little pile diminished, which so few persons are nowadays, I will reserve $50 for myself also. The amount rec'd is $778.50. Deducting the $75 from this, I send you a draft on N. York for bale., $703.50.

Do you expect to stay at Wilkes Barre any time? If so, you must make the acquaintance of some nice friends of mine who live there. They are Judge Conyngham's family. His oldest daughter, married some months ago — Mr. Parrish, is a very special friend of mine. He has another daughter, Miss Annie, a very nice person. His son, Lt. Col. Conyngham, was captured at Charleston some time ago & has recently been exchanged & is at home. Capt. Gibson
128 may meet with him, & should he do so I will be glad to be remembered to the family. If you expect to make a stay & will let me know how to direct her, I will write a note to Miss Annie requesting her to call on you.

Yours affectionately, WALTER S. COX.

Jan. 7, 1865.

Mrs. Fannie M. H. Gibson, care Capt. Gibson, Wilkes Barre, Pa.

P. S.—I am not sure that there is not a mistake in the amount. I have no memo. of the former payments & there is some confusion in Mr. Tayloe's entries. The only question is whether he deducted the interest on the taxes paid by him, in addition to the taxes, from his purchase-money. The interest was $36. One-third from each share would be $12, & if this was deducted it would reduce the amount to $766. You will remember what the other payments were.

W. S. C.

129 EXHIBIT W. S. C. No. 8.

Filed October 27, 1894.

DEAR FANNIE: Since writing to you yesterday I have received a letter from Mr. Tayloe saying he thinks there was a mistake in both his 2nd and his 3rd payments. I was under the impression that he had deducted all that was due him from the first payment (y'r share), and therefore I got a full third of the entire purchase-money, $833.33, from him for Gibson's share; but it seems, according to him, that this was not the case, but that after deducting his claim from the gross sum of $2,500 the balance gave to each heir $766.91. There was therefore an overpayment to Gibson of $66.42 & on this last payment of $11.59, making $78.01. It can be set right by your returning this sum when you get my draft *c*hashed. I write to you now that you may not invest the money till I write again, when I will give you the exact amounts.

Yours, &-., W. S. COX.

Jan. 10, 1865.

Mrs. Fannie M. H. Gibson, Wilkes Barre, Pa.

Endorsement: There was another letter from W—— in which he says *he says* he paid the 78.00. I have mislaid it, but it amounts to nothing.

130–174 EXHIBIT W. S. C. No. 9

Filed October 27, 1894.

DEAR FANNIE: Our collector of taxes met me in the street yesterday and informed me that there was a bill due for taxes on your lot lately sold and for expenses of tax sale. The purchasers, of course, expect that all taxes due before they purchased should be first paid. I didn't know of these taxes or had forgotten them. The amount is $38.46.

I am sorry to bother you with any afterclap when you thought everything was settled.

I called to see you at Mrs. Thomas' and found you had left.

Yours sincerely, WALTER S. COX.

Dec. 5, 1865.

Mrs. Fannie M. H. Gibson, care Maj. Geo. Gibson, Camp Winder, near Richmond.

* * * * * * *

175 *Final Decree Dismissing Bill, &c.*

Filed December 15, 1894.

In the Supreme Court of the District of Columbia.

FANNIE P. WILLIAMS *et al.*
vs.
JOHN W. PAINE *et al.* } No. 14529. In Eq.

This cause coming on regularly to be heard and having been argued by counsel for complainants and defendants and considered by the court, it is this 15th day of December, A. D. 1894, adjudged, ordered, and decreed that the bill be, and it is hereby, dismissed.

A. B. HAGNER.

From the foregoing decree the complainants, in open court, in presence of counsel for defendants, pray an appeal to the Court of Appeals, which is allowed.

A. B. HAGNER.

* * * * * * *

176 In the Supreme Court of the District of Columbia.

FANNIE P. WILLIAMS *et al.*
vs.
JOHN W. PAINE *et al.* } No. 14529. In Equity.

The President of the United States to John W. Paine, Estelle T. Paine, John Paine, Ogle Tayloe Paine, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the cause therein under and as directed by the rules of said court, pursuant to an appeal entered in open court in the supreme court of the District of Columbia on the 15th day of December, 1894, wherein Fannie P. Williams, Mary H. Bell, Robert Ransom, Jr., James J. B. Ransom, Matt W. McCorkle, Henry H. Ransom, George G. Ransom, and Seymour H. Ransom are appellants and you are appellees, to show cause, if any there be, why the decree rendered against the said appellants should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward F. Bingham, chief justice of the supreme court of the District of Columbia, this 15th day of December, in the year of our Lord one thousand eight hundred and ninety-four.

Seal Supreme Court of the District of Columbia.

JOHN R. YOUNG, *Clerk.*

Service of the above citation accepted this 17 day of December, 1894.

WM. E. JOHNSON,
Attorney for Appellee.

177 *Opinion of Justice Hagner.*

Filed December 19, 1894.

In the Supreme Court of the District of Columbia.

FANNIE P. WILLIAMS *et al.* }
vs. } In Equity. No. 14529.
JOHN W. PAINE *et al.* }

Opinion by Mr. Justice Hagner.

In January, 1837, George W. Peter conveyed to Henry Huntt and Benjamin Ogle Tayloe, as tenants in common, a large number of lots and the square known as square 53, lying in Washington city. Soon afterwards Dr. Huntt died intestate, leaving two daughters, Fanny and Mary, and a son named George Gibson Huntt, to whom his undivided interest in these lands descended. The children were very young at the time and lived with relatives and friends in Washington city until they were grown. Fanny married an army officer named Gibson; Mary married Robert Ransom, Junior, also an officer, and George Gibson Huntt also became an officer of cavalry, to which service Ransom belonged. Ransom and wife and George Gibson Huntt were stationed at Carlisle barracks, in Pennsylvania, in May, 1859. Ransom seems to have anticipated that he might soon be ordered to the western country, where the cavalry was generally on service, and the record of the births of their children, in the family Bible in evidence, shows that he and his wife soon moved there. The Washington city property had re-
178 mained undivided and apparently unused, Mr. Tayloe at one time buying it at tax sale for unpaid taxes and receiving a tax deed in 1864. Ransom was a native of North Carolina, and when that State seceded in the spring of 1861 he resigned his commission in the army and entered the Confederate service, where he rose to the rank of general. George Gibson Huntt remained in the old army. After the pacification General Ransom returned to North Carolina to live, where his wife died in 1881, leaving a number of children. He remained there until 1892, in which year he died.

The bill in this case is filed by the children of Robert Ransom, Jr., and his wife, Mary, against John W. Paine, the surviving husband of Julia D., one of the daughters of Benjamin Ogle Tayloe, and their infant children. It sets forth with some fullness the foregoing facts and alleges that John W. Paine, holding as tenant by the courtesy, has erected a large number of buildings all over the square and has received for himself all the rents and income therefrom. Its prayers are that a deed executed by George Gibson Huntt to the said Tayloe may be declared null and void as a cloud upon the title of complainants in the square of ground in Washington city described upon the plat of the city as square No. 53; that the right of the complainants to one-sixth interest therein in fee as

tenants in common may be established against the defendants; that the complainants may have their one-sixth part of said square set off to them if that may be found practicable, and, if not, that a sale of the property may be made for that purpose and their interest allotted to them out of the proceeds; that John W. Paine may be required to account to them for the rents and profits he has
179 received from the said square, and for further relief.

The defendants claim title to the undivided interest of Mary Ransom to square 53 under the will of Benjamin Ogle Tayloe, through an alleged sale and conveyance made by General Ransom and his wife to their ancestor. The instruments claimed to convey that interest consist of a power of attorney from Mrs. Ransom and her husband to George Gibson Huntt, the brother of Mrs. Ransom, which recited her claim to an interest in said square, among other real estate therein described, and that, to provide for the contingency of their absence, Ransom and wife (to pursue the words of the power of attorney) thereby "constitute and appoint in our place, put and depute the said George Gibson Huntt to be our true and lawful attorney-in-fact for us and in our name, place, and stead, to control, manage, grant, bargain, and sell, and in that event to convey all our right, title, and interest in and to the said lots and square of ground or any part thereof or to join in and for us and in our name to sign any proceedings in partition of the said lots and square or to appear for us in court for that purpose; and in regard to the said real estate to do, execute, and perform every act and thing necessary to be done, as fully and amply as we might or could do if personally present, and we do hereby ratify and confirm all and whatever our said attorney-in-fact may legally do in the premises."

This instrument was acknowledged on the 24th of May, 1859, before the presiding judge of the ninth judicial district of Penn-
180 sylvania, and the certificate of the judge contains a statement of the privy examination of the wife, in proper form, and the proper authentication under the act of Congress is appended. It was recorded among the land records of the District of Columbia on the 14th of January, 1865.

On the same day there was recorded a deed from George Gibson Huntt, dated November 29th, 1864, to Benjamin Ogle Tayloe, by which the said Huntt declared that "by virtue of the annexed power of attorney to me from Robert Ransom, Jr., and Mary, his wife," in consideration of $833.32 to him in hand paid, he has bargained and sold to said Tayloe, his heirs and assigns, all the right, title, and estate of the said Ransom and wife in and to all the lots and the square described in the power of attorney, with the appurtenances and improvements, concluding with the words "and I hereby further agree in behalf of said Robert Ransom, Jr., and Mary Ransom, his wife, that they shall and will, as soon as convenient, make and execute a proper deed of conveyance of said premises to said Benjamin Ogle Tayloe in fee-simple." This deed is signed "George Gibson Huntt," under seal, in presence of one witness.

It was acknowledged on the 4th of January, 1865, before two per-

sons, each of whom signs himself "alderman, *ex officio* justice of the peace." The clerk of the common pleas court of Dauphin county, Pennsylvania, appends his certificate, under seal of office, that the said persons were, in fact, at the time justices as they purport to be.

The complainants charge that these two instruments of writing are invalid and void so far as they purport to affect any title or interest of Mary Ransom in the said square of ground.

Of their informality on their face upon several grounds
181 there can be no doubt. But the defendants insist that whatever defects existed in these instruments themselves or in the aknowledgments attached to them have been cured by the operation of the act of Congress passed March 3rd, 1865 (13th Stats., p. 831), entitled "An act to quiet titles in favor of parties in actual possession of lands situated in the District of Columbia," which forms sections 459 *et seq.* of chapter 14, Revised Statutes of the District of Columbia, though differing in arrangement and in collocation of language and in some other respects. The first part of section 1 of the act enumerates in detailed order a variety of errors that are assumed to have appeared in the forms of deeds already recorded or in their acknowledgment; then follows a declaration that all such faulty deeds and acknowledgments shall be of the same effect and validity to pass the estate intended to be conveyed and to bar dower in the real estate therein mentioned in favor of parties in actual possession as if such deeds or acknowledgments had been made in the manner thereinafter set forth in successive paragraphs corresponding in arrangement with the order of statement of the particular faults first enumerated.

The section concludes with these two provisos, upon the existence of which the validation and cure of such instruments is made to depend: First, that the certificate of the acknowledgment by a *feme covert* to any such deed must show that her acknowledgment was made apart or privily from her husband or otherwise shall show that she declared it was made out of his presence, and that
182 she declared she willingly executed the deed or that it was her voluntary act or to that effect; and, second, that when a power of attorney shall have been executed by a *feme covert* the same shall be effectual and sufficient, provided there shall appear to have been such an acknowledment of such power of attorney by the wife as would be sufficient under the provisions of this act to pass her estate and interest therein were she a party executing the deed of conveyance.

The statute, in its enumeration of errors in conveyances theretofore recorded, comprehends and sets forth with most remarkable accuracy all the errors that appear in the power of attorney and deed before us. (1) George Gibson Huntt, the attorney-in-fact under the power, did not execute a conveyance under the power in the name of his principal, but in his own name; (2) the deed was acknowledged by Huntt "before officers different from those before whom proof of the power of attorney was made;" (3) the deed was acknowledged outside of the District before two aldermen of a

city; (4) there was not a complete certificate appended to the deed under the act of Congress as to the official character of the officer taking the acknowledgment. Indeed, the marked identity of description would almost suggest that the draughtsman of the statute had these instruments before him when he was framing the law.

These are four of the errors and defects the statute especially professed to cure, and after distinctly describing the — it then effectively declares that neither one nor all of these particular defects, errors, or omissions (thus plainly appearing in the power of attorney to Huntt and in his deed to Tayloe) shall invalidate the force
183 of those instruments, but that they shall be of the same validity as if the faulty paragraphs had been legally framed and expressed to pass the estate intended to be conveyed subject to the two provisos, the first of which (requiring the acknowledgment of the *feme covert* to show that it was privily made) appears to have been fully complied with, from the certificate to the power of attorney made by Judge Graham, and the second (that the acknowledgment of a power of attorney by a *feme covert* must have been in such form as would be sufficient to pass her estate and interest by a deed under the provisions of the act) is clearly shown to have been fulfilled in the acknowledgment by Mrs. Ransom of the power of attorney before Judge Graham.

The act, being highly remedial in its nature, must be beneficially construed; but it needs but a moderately liberate construction to include the present case within its benevolent purposes.

The statute plainly declares that a power of attorney executed by a *feme covert* shall be effectual and valid (if it has been acknowledged by her in the manner described therein) as sufficient to pass her estate and interest if she were party executing the deed of conveyance. Such an acknowledgment undoubtedly was made by Mrs. Ransom to the power of attorney.

It then results that Huntt was clothed by Mrs. Ransom and her husband with full power to convey her interest in the land by virtue of the power of attorney, and the other provisions of the act fully remedy the defects of his deed and its acknowledgment. As, then, upon the face of the act every informality in either of the two instruments is first carefully described and then each of said
184 informalities is declared seriatim to be thereafter cured (provided the two essential requirements designated in the provisos appear in the informal instruments), and as those instruments as then executed and acknowledged did manifestly contain these two essential requirements, their validation is complete, provided the act of 1865 is a constitutional exercise by Congress of its powers of legislation.

It is too late now to contest the general power of the legislature to pass statutes of this character. The instances in which it has been done in Maryland are very numerous. Many of such acts, of varied character, are referred to in 10 Maryland, 478, Calvert *v.* Williams, and many instances appear in the legislation of the other States, though not, perhaps, to the same extent. Congress has repeatedly legislated in the same direction. In the statute before us,

by sec. 3, another class of defects and omissions in disregard of directions of other statutes as to conveyance is healed; and sec. 458 of our Revised Statutes contains other provisions curative of such omissions enacted by the law of the 3rd of March, 1863, in the same direction.

It is insisted, however, by the complainants that the uttermost limits to which the act of 1865 could properly be extended would be to cure irregularities in deeds which would be valid except for these irregularities, and that it cannot be justly construed so as to make good the deed from Huntt to Tayloe and thus deprive Mrs. Ransom of her estate in the property, since such a result could only be accomplished by a direct conveyance signed by her and
185 acknowledged according to the law touching deeds by married women, notwithstanding the positive terms of the act of 1865.

There have been cases where the legislature under the guise of curing acts have attempted to interfere with the vested rights of the citizen, and wherever this mischief appears to have been attempted the courts will refuse to enforce such laws; but such an interference could only result from disregarding the true principles upon which legislation of this character is justified. Judge Cooley, in his discussion of the subject, assumes as a preliminary proposition that a party has no vested right in a defence based upon an informality not affecting his substantial equities. Cooley on Constitution- Limitation (370). He adds: "If the thing wanting or that failed to be done and which constitutes the defect in the proceedings is something the necessity for which the legislature might have dispensed with by prior statute, then it is not beyond the power of the legislature to dispense with it by subsequent statute, and if the irregularity consists in doing some act or in the mode or manner of doing some act which the legislature might have made immaterial by prior law it is equally competent to make the same immaterial by a subsequent law." (371.)

The author cites the decisions in Ohio, where statutes have been held valid that declared deeds previously executed by husband and wife should be received in evidence, although the magistrate shall not have certified that he had read the deed to the wife, notwithstanding the statutes then in force had declared that deeds
186 should be ineffectual for record and evidence where the officer omitted that statement from his certificate, the deeds being regarded by the courts as sufficient for conveying at least the grantor's equitable estate, and if sufficient for this purpose no vested right would be disturbed or wrong done by making them receivable in evidence as conveyances.

"Other cases," says the author, "go much farther than these and hold that, although the deed was originally ineffectual for the purpose of conveying the title, the healing statute may accomplish the intent of the parties by giving it effect." In 11 Ohio N. S., 641, Gosham *v.* Purcell, the court said: "The act of the married woman may under the law have been void and inoperative; but in justice and equity it did not leave her right to the property untouched.

She had capacity to do the act in a form prescribed by law for her protection. She intended to do the act in the prescribed form. She attempted to do it and her attempt was received and acted on in good faith. A mistake subsequently discovered invalidates the act. Justice and equity require she shall not take advantage of the mistake, and she has therefore no just right to the property. She has no right to complain if the law which prescribed forms for her protection shall interfere to prevent her reliance upon them to resist the demands of justice."

In 25 N. J., 187, State *vs.* Newark, the court said: "Laws curing defects which would otherwise operate to frustrate what must be presumed to be the desire of the party affected cannot be considered as taking away vested rights. Courts do not regard rights as vested contrary to the justice and equity of the case."

187 The decisions in the Supreme Court of the United States and in the other United States courts on this subject are in accordance with these principles.

In 23 Wallace, 138, Randall *vs.* Kreiger, it appeared that Randall and his wife, living in New York, had executed, in 1849, a power of attorney authorizing an agent to sell lands in Minnesota. Several years afterwards, in 1858, the attorney, professing to act in behalf of Randall and wife, sold the land and conveyed with general warranty and paid the purchase-money to the principals. Up to this time there was no law in Minnesota authorizing a *feme covert* to execute a power under seal to convey her real estate.

Two years afterwards, in 1857, the legislature passed a law authorizing a husband and wife to convey, by their attorney, lands within the State, and declaring that "all deeds of conveyance of any such lands, whether heretofore or hereafter made, shall be as binding and have the same effect as if made and executed by the original parties."

After the passage of the law Randall and wife, by an instrument duly executed, revoked the power of attorney made in 1849; soon afterwards Randall died, leaving all his estate to his wife. She then brought an action in the United States circuit court to recover her dower in the land, relying upon the informality of the power of attorney from herself and husband of the attorney's deed and upon the unconstitutionality of the curing law. The court (Dillon, J.) sustained the validity of the statute, and on appeal this ruling was affirmed by the Supreme Court. The case seems so fully

188 to cover that before us that it is needless to recapitulate the points of the opinion, and I quote a passage from the opinion of the court by Mr. Justice Swayne, chiefly by way of availing myself of the court's statement of the earlier case of Watson *v.* Mercer, 8 Pet., 100, on the same subject.

Says Justice Swayne: "The power of a legislature under the circumstances of this case to pass laws giving validity to past deeds which were before ineffectual is well settled."

"In Watson *vs.* Mercer the title to the premises in controversy was originally in Margaret Mercer, the wife of James Mercer. For the purpose of transferring the title to her husband they conveyed

to a third person, who immediately conveyed to Mercer. The deed of Mercer and wife bore date of the 30th of May, 1785. It was fatally defective as to the wife in not having been acknowledged by her in conformity with the provisions of the statutes of Pennsylvania of 1770 touching the conveyance of estates by *femes covert*. James Mercer died leaving children by a former marriage. After the death of both parties her heirs sued his heirs in ejectment for the premises and recovered. The supreme court of the State affirmed the judgment. In 1826 the legislature passed an act which cured the defective acknowledgment of Margaret Mercer and gave the same validity to the deed as if it had been well executed originally on her part. The heirs of James Mercer thereupon sued her heirs and recovered back the same premises. This judgment was also affirmed by the supreme court of the State, and the judgment of affirmance was affirmed by this court. This case is conclusive of the case before us."

189 The reports of these cases show the same class of arguments were urged before the supreme court that have been presented here, attacking the scope and authority of the curing acts, but they were overruled.

The learned justice added: "This curative act of 1857 has a strong natural equity at its root. It did for her (the wife) what she had attempted to do, intended to do, and doubtless believed she had done, and for doing which her husband was fully paid." "The act accomplished what a court of equity, if called upon, would have decreed promptly as to the husband and would have failed to do so as to the wife only from a want of power. The unbending rule of law as to *femes covert* in such cases would have prevented it. The legislature thus did what right and justice demanded, and the act strongly commends itself to the conscience and approbation of the judicial mind."

The same observations apply to the case before us. Ransom and wife fully intended to confer an ample power to sell the property upon her brother, and probably none of the parties for ten years doubted its sufficiency. Huntt sold Mrs. Ransom's interest for the same amount he and his other sister each obtained for their equal shares. There is proof the consideration was a fair one; that the sale was made with the purpose of aiding General and Mrs. Ransom; that Mrs. Ransom was in Washington on a visit to her sister after the war; that she received all the purchase-money, and no word of complaint by her or her husband as to the propriety or validity of the sale is disclosed in the record, although she lived seventeen years and he twenty-eight years after it had been effected. As was said in Randall *vs.* Kreiger, consent to remedy the irregularity upon their part must be presumed.

190 We are at liberty, it may be added, to examine the original statute of 1865 to ascertain the particulars in which the revision may have interferred with its language in the distribution of the act into different sections; and it is clear that no subsequent revision of the statute could affect the validity of the deed after it was established in 1865 by the terms of the curing act.

Osborne *v.* Nicholson, 13 Wall., 662.

But it is contended on behalf of the complainants that however the law might be as to the curative act between suitors generally, yet the intervention of the civil war wrought such a change in the relations of these parties that this case must be excepted out of the ordinary effect of the statute.

It may be said, *in limine*, that the statute is most general in its terms, and which are broad enough to comprehend, without exception, all deeds. It was passed, *flagrante bello*, and Congress must have known that such errors and omissions would probably have occurred frequently in deeds executed during that period between parties residing in different portions of the count-y which were then in hostility. The intervening distance and the disadvantages under which such transactions would necessarily have been conducted would inevitably have caused a larger ratio of errors and irregularities in such instruments than in deeds between parties living near together and under the same military surroundings; and yet nothing is suggested in the law excepting such deeds from its effect, as would naturally have been the case if Congress had not intended the law should cover all cases where such defects appeared
191 in conveyances, as it professed to do.

The court has been referred to authorities assenting the general principle that all commercial intercourse between the citizens of the belligerent countries is revoked by a war between them, and to several decisions in some of the Southern States declaring that powers of attorney executed before the late civil war by a citizen on one side of the lines to one on the other side were revoked by the hostilities.

The general principle is founded upon the idea that if such intercourse is allowed a person on one side may render pecuniary assistance to citizens of the enemy's country; but the authorities also state that when this consequence cannot result the rule does not apply. Thus in one of complainants' cases, 11th Heiskell, 739, it is held the power of an agent to collect funds of his principal continues, notwithstanding the war, but that he has no right to transmit them across the lines, nor does the general principle apply, "as was said by Justice Washington in Conn. *v.* Penn., 3 Wash. C. C., 396, where the creditor, though a subject of the enemy, remains in the country of the debtor or has a known agent there authorized to receive the debt, because the payment to such creditor or his agent could in no respect be construed into a violation of the duties imposed by a state of war upon the debtor. The payment in such cases is not made to an enemy, and it is no objection that the agent may possibly remit the money to his principal." "Nor can the rule apply when one of several joint debtors resides within the same country with the creditor or with the known agent of the creditor." 4 H. and McH., 161; Paul *vs.* Christie, 16 Johns. (484); Griswold *v.* Waddington.

192 In the Georgia and North Carolina cases and in 4th Court of Claims, 517, the decisions turned upon the assumption of power by the agent beyond his authority, although the general

principle is stated in each (except in 4th Court of Claims) as contended for by complainants' counsel.

In 19 Johnson (137), Buchanan *v.* Curry, payment was made by a citizen of New York during the war of 1812 to an agent of a Canadian, residing also in New York, on a contract made before the war. The court say, p. 141: "The war suspended the remedy by suit on the contract, but it is not unlawful voluntarily to pay debts or perform contracts to alien enemies if the payment be made or the duty be performed in our country." In illustration the court supposes the case of a contract was made before hostilities by an American with an Englishman to deliver flour in New York, which the court held it would be lawful to fulfill by delivering the flour to the Englishman, though an alien, during the continuance of the war, provided it was delivered in New York.

In 20 Grattan, 630, Manhattan Co. *vs.* Warwick, the insurance company had issued a life policy in Virginia before the war. During the war the company had an agent residing in Richmond, but he had refused to receive the premiums which were tendered to him. The insured died during hostilities, and in the suit on the policy it was held the offer was the equivalent of payment and the war was not a sufficient excuse for the agent's refusal. The court of appeals declare "if the contract can be carried into execution, notwithstanding the war, without conflicting with the obligation of allegiance to either party, it will neither be dissolved or suspended."

193 Assuming, as we must in the present inquiry, that the power of attorney and deed are valid but for this objection, it seems to me this transaction falls within the above exceptions to the rule relied on, if, indeed, the rule could apply to a case like the present in any event.

The power of attorney made before the war authorized Huntt to sell the lands in the non-seceding States, where he himself lived and continued to live. Its sale could in no way aid the Confederate States, for the agent could only have received the money and could not have remitted it. Says Justice Field in Ward *v.* Smith, 7 Wallace, 447: "It does not follow that the agent, if he receives the money, will violate the law by remitting it to his principal." "If he should do so the offence is imputable to him," says Justice Washington in Conn *v.* Penn, "and not to the person paying him the money."

But I cannot think this general principle, relating to commercial intercourse between belligerents, has application to a transaction like this, between citizens of the United States who happened to be on different sides during our civil war. Although some of the principles applicable to a war between foreign nations were invoked during that conflict, the present rights of citizens to their private property are not to be passed upon as if the United States had been engaged in a war with England or some other foreign country. Every citizen of Great Britain is an alien as to this country, for he is the citizen of an established government and owes allegiance to no other; but General Ransom was a citizen of the United

States when he executed the power of attorney, and he never was an alien in the sense in which an Englishman is an alien.
194 If the secession had been successful and an independent government had been established, such would have been his status towards this country; but that state of case never came to pass, and therefore no such change in his status took place. If an Englishman during a war with our country were to come to New York he would still be an alien, subject to all the incapacities of alienage, and would remain such unless he were made a citizen here by naturalization. Multitudes of persons whose homes were in the seceded States were within the loyal States during the war, but they were under no incapacity as to buying or selling or conveying property here. After the pacification General Ransom was still a citizen of the United States, not because of any naturalization, but because his original status remained undisturbed, as he had never become a citizen of another established government. Certainly Mrs. Ransom, who was the owner of the property and was born a citizen of the United States, never lost that citizenship. If her husband had become a citizen of an established government, she might then, by some act of adoption on her part or possibly by reason of her wifehood, have changed her citizenship into a condition of alienage as to the United States; but as that event never happened, I hold she never was an alien, and never could on that assumption have been subjected to all the severe rules that govern such a condition. Nothing would have been more unjust than for the courts to have adopted and enforced the contrary view. Numbers of persons who served in the Confederate armies have been and are now holding high official positions under the United States Government who never dreamed they were aliens when the
195 war closed, and to become citizens of the United States it was necessary for them to go through the formality of naturalization incumbent upon the foreign-born. The Supreme Court in 1st Peters, 343, has shown that the word alien signifies a foreigner; but each of these men could say with Paul, "But I was free-born."

The instances during the war of the adoption by law or regulations on both sides of some of the penalties and rules that obtain in wars between alien belligerents did not operate to make the contestants aliens. A war even between brothers must have many of the sad accompaniments of misery and death that attend conflicts in arms between foreign States, but the contestants are not for that reason made aliens and foreigners to each other. The disabilities declared by President Johnson to apply to certain enumerated classes, such as high officers in the Confederate army, did not convert those persons into aliens. But these were all abrogated by a general amnesty for all transactions that had taken place during the war, and any liability for such transactions was thereby as fully obliterated as if they had never occurred.

Justice Field, in Ward *v.* Smith, 7 Wallace, 483, says: "It is not necessary to consider here whether the rule that interest is not recoverable on debts between alien enemies during war of their respective countries is applicable to debts between citizens of States

in rebellion and citizens of States adhering to the National Government in the late civil war," thus showing the court recognized the difference between the status of citizens of the United States on
196 different sides in a civil strife and citizens of separate governments always alien to each other. Could England have considered the revolting Canadians as aliens after the close of that war? It matters not as to this inquiry whether the war continued one month or five years, the event determines the status of the country and of the people. The Brazilians recently in revolt against the new republic there were not aliens during its continuance, nor did they become such after its suppression; and so of the numerous insurrections in France.

A ground of objection relied on by the defendants is that this is a bill for partition brought by alleged tenants in common, not in possession, against their co-tenants, who are admitted to be in possession, seeking for a decree which shall apportion to them their sixth part of the land and premises, and that this is precisely the relief that could be sought and secured by an action of ejectment at law, and is therefore not attainable in equity.

In Killian *v.* Ebbinghaus, 110 U. S., 573, the Supreme Court dismissed a bill brought by parties out of possession calling for a recovery of possession of land upon the ground that such relief could only be obtained by action at law. The court there quote from the opinion in Hipp *vs.* Babin, 19 How., 271, in which it was said: "The bill in this case is in substance and legal effect an ejectment bill; the title appears by the bill to be merely legal." "Whenever a court of law is competent to take cognizance of a right and has power to proceed to a judgment which affords a plain, ade-
197 quate, and complete remedy without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by a jury." And the court adds that it will, *sua sponte*, enforce this principle, though the point may not be raised by the pleadings or suggested by counsel.

That this bill is of the character described does not admit of question. It ex[illegible]licitly claims an ownership in common by the complainants (showing they are out of possession) with the defendants, and avers that the defendants have built on the land and are receiving all the rents from the houses and exclude the complainants, and the prayer is for a partition, and the bill is endorsed by counsel as a "bill for partition."

Upon such a case and such allegations this court, in 6 Mackey, p. 157, Moore *v.* Shannon, dismissed a bill brought by children against their mother for partition of land held by the mother for life which had been assigned to her as her dower, adopting the principle stated by Freeman on cotenancy and partition, section 446, to prevail universally in England and also throughout the majority of the United States, that no person has the right to demand any court to enforce a compulsory partition unless he has an estate in possession, one by virtue of which he is entitled to enjoy the present rents or the possession of the property as one of the co-tenants thereof, and declaring that, whether the title of a co-tenant or co-

parcener be legal or equitable, it is still, notwithstanding the act of 1876, indispensable to his right to institute such proceedings that he should be actually seized or in possession of whatever estate he may claim to be entitled to. The same statement of the law is to
198 be found in 2nd White and Tudor's Leading Cases in Equity, Agar *v.* Fairfax, pp. 900–903, and in 8 L. R. Equity Cas. (470), Evans *v.* Bigelow.

The plaintiffs previously seemed to recognize the necessity of bringing suit at law for the relief they now seek, and accordingly instituted the three ejectment suits given in evidence, in which they expressly aver the possession of the defendant John W. Paine and their own ejectment by him.

It is true Mr. Pomeroy, vol. 3, sec. 1387, says, as is stated by complainants' counsel, that the remedy in equity in partition is not confined to tenants in possession, but extends to all persons interested, whether presently or in expectancy, etc.; but it is also true that in note No. 1 to the section he says: "While all persons interested in the land, whether in possession or expectancy, are proper parties to a bill for partition, only those in possession are entitled to file the bill."

There is another difficulty in sustaining the complainants' right to relief in equity. Pomeroy, in section 1388, says: "The complainant must show title in himself and such title as will establish his rights as against the defendant to a partition. When the complainant's legal title is disputed, courts of equity decline the jurisdiction to try this question; but in analogy in dower they will retain the bill for a reasonable time until the issue of title has been determined by law."

In Mudd *v.* Grinder, equity, No. 13113, this court acted on this principle, and its action was affirmed by the higher court.

That there is a very serious dispute about the title to these lands between the complainants and the defendants cannot very
199 well be denied by the complainants.

Hence it would be impossible to proceed now with this case, even if it were not so evident the complainants are not in possession; but there would be no excuse for retaining the present suit for the determination of an action at law to try the title, because no case is made to justify such action by the court.

For these reasons I will sign a decree dismissing the bill.

A. B. HAGNER.

December 15th, 1894.

200 Supreme Court of the District of Columbia.

I, John R. Young, clerk of the supreme court of the District of Columbia, do hereby certify that the foregoing pages, numbered from 1 to 199, inclusive, are true copies of the originals in cause No. 14529, in equity, wherein Fannie P. Williams, Mary H. Bell, Robert Ransom, Jr., James J. B. Ransom, Matt W. McCorkle Ransom, Henry H. Ransom, George G. Ransom, and Seymour H. Ransom are complainants and John W. Paine, Estelle T. Paine, John Paine,

and Ogle Tayloe Paine are defendants, as the same appear upon the files and records of said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 14th day of January, A. D. 1895.

JOHN R. YOUNG, *Clerk.*

201 In the Court of Appeals of the District of Columbia.

FANNIE P. WILLIAMS *et al.*
vs.
JOHN W. PAINE *et al.*
} No. 421.

The appellant- hereby assigns as errors in the court below the following:

1. The court erred in finding that the alleged power of attorney, dated the 23rd day of May, 1859, from Robert Ransom, Jr., *et ux.* to George Gibson Huntt was a valid and sufficient instrument to pass the fee of Mary Ransom to the real estate therein described.

2. In finding that the paper dated the 29th day of November, 1864, and found on page 58 of the transcript of the record was a valid and sufficient instrument to pass the fee title of Mary Ransom to the real estate described therein.

3. In holding that said alleged power of attorney had not been revoked.

4. In holding that the act of Congress March 3d, 1865, cured any of the alleged defects in the instruments mentioned in the 1st and 2nd of these assignments of error.

5. In holding that said Mary Ransom, a married woman, was by said act empowered to convey her real estate by power of attorney, and that said act was retroactive.

6. In not holding that as neither the defendants nor those under whom they claim were in actual possession of said real estate on the 3rd day of March, 1865, the said act of Congress of that date had no application to the instruments mentioned in the 1st and 2nd assignments of error.

7. In finding that the purchase-money from the alleged sale of the land in controversy was received by said Mary Ransom.

8. In dismissing the bill of complaint.

202 9. In not granting the relief prayed for in said bill.

FRANKLIN H. MACKEY,
H. O. CLAUGHTON,
Sol's for Pl'ff-.

Wm. G. Johnson, Esq., sol. for defendants.

SIR: Take notice that the foregoing assignments of error will be relied on to sustain the appeal prosecuted in this cause, and that we hereby designate all of the transcript of the record to be printed as necessary to the hearing of the cause except the following designated portions thereof:

1st. Omit the joint answers of the defendants Estelle T. Paine *et al.*, found on pp. 20 *et seq.* of the transcript, except the last 12 lines of said joint answer, on page 29, and print on page 19, immediately following the answer of the defendant John W. Paine, the following, to wit: "The answers of the other defendants are the same in substance as the foregoing answer of the defendant John W. Paine except the last twelve lines, which are as follows." (Here insert said last 12 lines.)

2. Omit pages 32, 33, 34, 35, 41, 42, and 51 of the transcript.

3. Omit that part of page 54 beginning with the words "I certify" down to the end.

5. Omit that part of page 59 beginning at the word "endorsement" down to the end.

6. Omit pages 60, 61, 62, and 63, and say in lieu thereof, "Exhibit J. A. L. No. 3 is a deed from George W. Peter, dated the 23d of January, 1837, and conveying to Henry Huntt and Benjamin Ogle Tayloe in fee as tenants in common the land described in Exhibit J. A. L. No. 1, said deed being recorded in the land records of the District of Columbia Jan'y 27, 1837, in Liber W. B. 63, folio 212 *et seq.*"

7. Omit page 65 and so much of page 66 as begins with the words "In the Supreme Court" and ends with "testified as follows."

203 8. Omit all of page 82 after the words "and I further certify," &c.

9. Omit all of pages 83 and 84 and the first 9 lines of page 85.

10. Omit all of pages 100, 101, and 102.

11. Omit pages 117 to 121, inclusive, and the first six lines of page 122, and say in lieu thereof, "Exhibits W. S. C. No. 1 and W. S. C. No. 2 are the same as Exhibits J. A. L. No. 1 and J. A. L. No. 2."

12. Omit pages 122, 123, & 124, and say in lieu thereof, "Exhibit W. S. C. No. 3 is a deed, dated October 28, 1864, from George Gibson Huntt to Benjamin Ogle Tayloe, conveying in fee all his (Gibson's) interest in the land described in Exhibit J. A. L. No. 1 and recorded in the land records of the District of Columbia November 26, 1864, in Liber N. C. T. No. 50, folio 92 *et seq.*

13. Omit all of Defendants' Exhibits Nos. 10 & 11, on pp. 131 to 167, and the first six lines of page 168, and say in lieu thereof:

"Defendants' Exhibit No. 10 is a duly certified copy of a deed from the corporation of Washington to Benjamin Ogle Tayloe, dated the 20 day of June, 1864, and recorded in said land records June 21, 1864, and purporting to convey in fee to said grantee the land described in Exhibit J. A. L. No. 1, the said deed being what is known as a 'tax deed,' made in pursuance of an alleged sale by said corporation of said land for non-payment of taxes."

"Defendants' Exhibit No. 11 is a duly certified copy of the will and codicils thereto of Benjamin Ogle Tayloe, the will being dated July 1, 1856, and duly probated in the orphans' court of said District July 11, 1868. Said will devises in fee to the testator's daughters, Estelle Francis Tayloe, Eugenia Pheobe Warren, and Julia Dickenson Tayloe (who was afterwards the wife of the defendant John W.

69 Paine and known in these proceedings as Julia Paine), all the real estate claimed to be owned by the testator in Washington, D. C., excepting only certain pieces not material to be referred to in this cause, and is republished by codicil dated November 20, 1867."

14. Omit all of Defendants' Exhibit No. 12 as contained on pages 168 to 173 of the transcript, and say:

"Defendants' Exhibit No. 12 is a partition deed, dated November 7, 1870, from Pheobe W. Tayloe, widow of Benjamin Ogle Tayloe; Eugenia Pheobe Warren *et vir*, and Edward Thornton Tayloe, children and devisees of said Benjamin Ogle Tayloe, to Julia Dickenson Paine, daughter of said Tayloe and wife of the defendant John W. Paine. Said deed conveys in fee to said grantee all the interest of the grantors in and to the said square 53 and is recorded in the land records of the District of Columbia December 13, 1870, in Liber 633, folio 278."

15. Omit all of pages 173 & 174.

16. Omit all of page 175 after the 16th line.

FRANKLIN H. MACKEY,
H. O. CLAUGHTON,
Sol. for Pl'tffs.

Service acknowledged this 22d day of January, A. D. 1895.

WM. G. JOHNSON,
Solicitor for Defendants.

(Endorsed:) Court of Appeals, D. C., January term, 1895. No. 421. Fannie P. Williams *et al.*, appellants, *vs.* John W. Paine *et al.* Appellants' assignment of errors and designation of parts of record to be printed. Court of Appeals, District of Columbia. Filed Jan. 22, 1895. Robert Willett, clerk.

Endorsed on cover: District of Columbia supreme court. No. 421. Fannie P. Williams *et al.*, appellants, *vs.* John W. Paine *et al.* Court of Appeals, District of Columbia. Filed Jan. 22, 1895. Robert Willett, clerk.

ADDITION TO RECORD PER STIPULATION OF COUNSEL. FILED M'CH 28, 1895.

Order for Appearance of Absent Defendants.

Filed March 20, 1893. J. R. Young, clerk.

In the Supreme Court of the District of Columbia, the 20 Day of March, 1893.

FANNIE P. WILLIAMS *et al.* *vs.* JOHN W. PAINE, ESTELLE T. PAINE, JOHN PAINE, OGLE TAYLOE PAINE.	In Equity. No. 14529, Docket 35.

On motion of the plaintiffs, by Mr. Franklin H. Mackay, their solicitor, it is ordered that the defendants, John W. Paine, Estelle

70 T. Paine, John Paine, and Ogle Tayloe Paine, cause their appearance to be entered herein on or before the first rule day occurring forty days after this day; otherwise the cause will be proceeded with as in case of default.

The object of this suit is to remove a cloud from the title of complainants to their one-sixth interest in square fifty-three (53), in the city of Washington, and for a partition or sale of said square between the plaintiffs and defendants and for an account of rents and profits.

By the court:

E. F. BINGHAM,
Chief Justice, &c.

Motion to Quash Order of Publication.

Filed April 4, 1893. J. R. Young, clerk.

In the Supreme Court of the District of Columbia.

FANNIE P. WILLIAMS *et al.*
vs.
JOHN W. PAINE *et al.*
} No. 14529. In Eq.

Now comes John W. Paine, by Wm. G. Johnson, his solicitor, &, not admitting any jurisdiction in this court, but expressly denying the same, & appearing specially for the purposes of this motion & for no other purpose whatsoever, moves the court to quash and set aside the order of publication herein, passed on the twentieth day of March, A. D. 1893, against him and the other defendants herein named, because he says that this court is and was at the time of making the said order of publication herein without any power or jurisdiction to make said order & is without any jurisdiction to proceed in said cause, as fully appears by the record in this case.

JOHN W. PAINE,
By WM. G. JOHNSON,
His Solicitor.

Order Denying Motion to Quash Order of Publication.

In the Supreme Court of the District of Columbia.

FANNIE P. WILLIAMS *et al.*
vs.
JOHN W. PAINE *et al.*
} No. 14529. In Eq.

This cause coming on to be heard upon the motion filed herein on the fourth day of April, A. D. 1893, to quash the order of publication herein passed on the twentieth day of March, A. D. 1893, and having been argued by counsel and considered by the court, the same is, this 17th day of April, A. D. 1893, denied.

E. F. BINGHAM, *C. J.*

71 *Motion to Quash Order of Publication.*

Filed April 20, 1893. J. R. Young, Clerk.

In the Supreme Court of the District of Columbia.

FANNIE P. WILLIAMS *et al.*
vs.
JOHN W. PAINE *et al.* } No. 14529. In Eq.

Now come the defendants, Estelle T. Paine, John Paine, and Ogle Tayloe Paine, by Wm. G. Johnson, their solicitor, &, not admitting any jurisdiction in this court, but expressly denying the same, & appearing specially for the purposes of this motion & for no other purpose whatsoever, move the court to quash and set aside the order of publication herein, passed on the twentieth day of March, A. D. 1893, against them & the defendant John W. Paine, because they say that this court is and was at the time of making the said order of publication herein without any power or jurisdiction to make said order & is without any jurisdiction to proceed in said cause, as fully appears by the record in this case.

ESTELLE PAINE,
JOHN PAINE,
OGLE TAYLOE PAINE,
By WM. G. JOHNSON,
Their Solicitor.

Order Denying Motion.

In the Supreme Court of the District of Columbia.

FANNIE P. WILLIAMS *et al.*
vs.
JOHN W. PAINE *et al.* } No. 14529. In Equity.

Upon consideration of the motion this day filed on behalf of the defendants, Estelle, John, & Ogle Tayloe Paine, to quash the order of publication herein, it is by the court, this 20th day of April, ordered that the same be, and it is hereby, denied.

E. F. BINGHAM, *C. J.*

MARCH 28, 1895.

It is hereby stipulated by counsel for appellant- and appellee- that the foregoing four pages, omitted from the transcript by the clerk of the court below, under paragraph "*b*," section 1, of rule V of this court, be included in the transcript of the record and printed as part thereof.

FRANKLIN H. MACKEY,
Counsel for Appellant-.
WM. G. JOHNSON,
Counsel for Appellee-.

(Endorsed:) Fannie P. Williams *et al.*, appellants, *vs.* John W. Paine *et al.* Addition to record per stipulation of counsel. Court of Appeals, District of Columbia. Filed Mar. 28, 1895. Robert Willett, clerk.

72 In the Court of Appeals of the District of Columbia.

MARCH 29TH, 1895.

FANNIE P. WILLIAMS *et al.*
vs.
JOHN W. PAINE *et al.* } No. 421.

It is mutually stipulated by and between the parties to this cause, by their respective solicitors, that the signature of J. H. Graham affixed to the acknowledgment of the original paper known as Exhibit J. A. L. No. 1 and copied in the printed record on pages 21 and 22 has a seal opposite said signature.

Also that the original of Exhibit J. A. L. No. 1 and copied in the printed record on page 23 is in the handwriting of Walter S. Cox and is endorsed in his handwriting as follows:

George Gibson Huntt to Benjamin Ogle Tayloe. Contract of sale.

FRANKLIN H. MACKEY,
Solicitor for Appellants.
WM. G. JOHNSON,
Solicitor for Appellees.

Endorsed: Court of Appeals, D. C., January term, 1895. No. 421. Fannie P. Williams *et al.*, appellants, *vs.* John W. Paine *et al.* Stipulation of counsel. Court of Appeals, District of Columbia. Filed Mar. 29, 1895. Robert Willett, clerk.

73 WEDNESDAY, *May 8th, A. D.* 1895.

* * * * * * *

FANNIE P. WILLIAMS, MARY H. BELL, ROBERT RANSOM, Jr., James J. B. Ransom, Matt W. McCorkle, Henry H. Ransom, George G. Ransom, and Seymour H. Ransom, Appellants,
vs.
JOHN W. PAINE, ESTELLE T. PAINE, JOHN PAINE, OGLE TAYLOE PAINE. } No. 421.

On motion of Mr. F. H. Mackey the time for argument is enlarged and extended for one hour on each side. The argument in the above-entitled cause was commenced by Mr. F. H. Mackey, attorney for the appellants, and was continued by Mr. W. G. Johnson, attorney for the appellees.

THURSDAY, *May 9th, A. D.* 1895.

* * * * * * *

FANNIE P. WILLIAMS, MARY H. BELL, ROBERT RANSOM, Jr., James J. B. Ransom, Matt W. McCorkle, Henry H. Ransom, George G. Ransom, ans Seymour H. Ransom, Appellants,
vs.
JOHN W. PAINE, ESTELLE T. PAINE, JOHN PAINE, OGLE TAYLOE PAINE. } No. 421.

The argument in the above-entitled cause was continued by Messrs. W. G. Johnson & Calderon Carlisle, attorneys for the appellees, and was concluded by Mr. H. O. Claughton, attorney for the appellants.

74 FANNIE P. WILLIAMS, MARY H. BELL, ROBERT Ransom, Jr., James J. B. Ransom, Matt W. McCorkle, Henry H. Ransom, George G. Ransom, and Seymour H. Ransom, Appellants,
vs.
JOHN W. PAINE, ESTELLE T. PAINE, JOHN PAINE, OGLE TAYLOE PAINE. } No. 421.

Opinion of Court.

Mr. Chief Justice ALVEY delivered the opinion of the court:

The bill in this case was filed on the 10th of February, 1893, by the appellants against the appellees. The bill, as amended, is framed with several aspects, and seeks to obtain relief in respect to several matters, and in various forms. The plaintiffs allege themselves to be entitled in fee, as heirs-at-law of Mrs. Mary Ransom, deceased, to one undivided sixth part of square No. 53, located in the city of Washington, District of Columbia, as tenants in common with the defendants, who own the other five-sixths of said square. Mrs. Ransom, under whom the plaintiffs claim, was the wife of General Robert Ransom, and died intestate, in North Carolina, February 7, 1881, her husband surviving her, but who has since died, and before the filing the bill in this case.

It appears from the allegations of the bill and the proof, that Mary Huntt, one of the three children left by Dr. Henry Huntt, who had died intestate, intermarried with Robert Ranson, Jr.; and that the three children, namely, Mary Huntt, afterwards Mary Ransom, Fannie Huntt, who intermarried with George Gibson, and George Gibson Huntt, inherited as heirs-at-law of their father Dr. Henry Huntt, the one moiety or half of said square No. 53, and of certain other parcels of ground in the city of Washington—the same having been previously acquired and held in equal moieties or halves, as tenants in common, by the said Dr. Henry Huntt and the late Benjamin Ogle Tayloe; that, being so seized and possessed, after their marriage, Mary Ransom and her husband, Robert Ransom, then an officer in the Army of the United States, and stationed at Carlisle, in

the State of Pennsylvania, by their joint power of attorney, executed and acknowledged on the 23d of May, 1859, to George Gibson Huntt, the co-owner and brother of Mrs. Ransom, authorized and empowered the said George Gibson Huntt to control, manage, bargain and sell, and in that event to convey, etc., all their right, title, and interest in said property. George Gibson Huntt was also an officer in the army. About two years from the date of the power of attorney, the civil war broke out between the States, and Robert Ransom resigned his commission in the Army of the United States, and accepted a commission in the Confederate States army, and afterwards attained the high rank of major general in that army; and during the war his wife, the mother of the plaintiffs, remained in the South, within the Confederate lines. In the summer of 1864, and during the continuance of the war, Walter S. Cox, Esq., then a practicing attorney here in the city of Washington, a relative of the heirs of Dr. Huntt, and now one of the associate justices of the supreme court of the District of Columbia, was solicited, especially by Mrs. Gibson, to effect a sale of the interest of the Huntt heirs in the property mentioned and referred to in the power of attorney, including square No. 53, held as tenants in common as before stated. Accordingly, Mr. Cox, through a real-estate broker, did effect a sale of all the interest of all the parties claiming as heirs of Dr. Huntt, in the property so held as tenants in common, and which sale was made to Benjamin Ogle Tayloe, the cotenant, at and for the sum of $2,500. Thereupon Mr. Cox rendered a statement to Mrs. Gibson, one of the parties in interest and a sister of Mrs. Ransom, as follows:

Amount of purchase.....	$2,500 00
Payment of taxes by Mr. Tayloe, amounting to.....	199 27
Leaving balance of.....	$2,300 73

75 to be divided into three parts, making the dividend to each of the three heirs the sum of $766.91. The whole amount of the purchase-money, less the taxes deducted, was paid by Mr. Tayloe to Mr. Cox, and the latter paid over the same to Mrs. Gibson; and the share of Mrs. Ransom was paid over to her, Mrs. Ransom, by her sister, Mrs. Gibson. And on the 29th of November, 1864, George Gibson Huntt, by virtue of the power of attorney from Ransom and wife, before referred to, reciting the sale and payment of the purchase-money, made and executed the deed to Tayloe, set forth in the record. Both the power of attorney and this deed to Tayloe were admitted to record together on the 14th of January, 1865.

It also appears, both from allegations and proof, that Benjamin Ogle Tayloe died testate in 1868, leaving several children, among them a daughter Julia Dickinson Tayloe, who had previously married John W. Paine, one of the defendants; and that the testator by his will, and codicil thereto, devised his real estate, including square No. 53, to his three daughters in fee-simple, as tenants in common That afterwards, by deeds of partition, dated November 7, 1870, the

real estate so devised in common was divided, and the devisees took their respective shares in severalty, and in this partition square No. 53 was allotted and conveyed to Mrs. Paine. Mrs. Paine died intestate in February, 1872, leaving surviving her her husband John W. Paine, and as her only heirs-at-law three infant children, defendants in this case. The property was vacant and wholly unimproved; and some time before the purchase of the interest of the Huntt heirs, as above stated, their interest in the property had been sold for taxes due the corporation of the city of Washington, and Tayloe had become the purchaser and taken a deed therefor; and from that time forward he continued to pay all taxes and public dues thereon; and from the time of the partition of the real estate among the three daughters of the testator, John W. Paine, one of the defendants, continued to pay the taxes thereon, and to exercise exclusive ownership over the same, in right of his wife, and for himself and his children; and subsequently, at a cost of about $125,000, he erected twenty-two stone and brick dwelling-houses on the square, from which he has been in the receipt of the rents.

The bill, alleging the facts to which we have referred, and others less material, prays for the following relief—

1st. That the deed or instrument purporting to be made by George Gibson Huntt, by virtue of the power of attorney made to him by Ransom and wife, be declared null and void, as a cloud upon the title of the plaintiffs:

2d. That the right of the plaintiffs to a one-sixth part or interest in fee as tenants in common in said square No. 53 be established against all the said defendants by decree, as well the tenant for life, as the reversioners, heirs-at-law of Mrs. Paine, deceased:

3d. That plaintiffs may have the said one-sixth part of square No. 53 set off to them in one undivided interest, if that be found practicable, and if not, that a sale of said square may be had under the direction of the court, and a distribution of the proceeds according to the interests of the parties entitled:

4th. That John W. Paine, the surviving husband of Mrs. Paine, and one of the defendants, be required, under the direction of the court, to account to the plaintiffs for the rents and profits received by him from the said one-sixth part of said square No. 53, and that accounts thereof be taken; and,

5th. That the plaintiffs may have all such further and other relief as the nature of the case may require.

All grounds of relief as set forth in the bill are controverted by the answer of John W. Paine, the tenant for life; and the other defendants, by their answer, say that they are not in possession of said square, and have never been in possession of it; and that the property in controversy descended to them upon the death of their mother, subject to an estate for life by the courtesy vested in their father; and that they have no manner of interest or concern with the account of rents and profits prayed against the life tenant, and they therefore object to the bill as being multifarious. With respect to most of the facts alleged, they say they have no personal knowledge, and they therefore demand proof thereof.

The court below dismissed the bill, and the plaintiffs have appealed.

There is a preliminary objection taken to the right of the plaintiffs to maintain the bill, which is aside from the real merits of the case, and that is, that as the plaintiffs are out of possession of the property, and the principal relief prayed being for removal of cloud from the title and for partition of the property either in specie, or for sale for purposes of partition of the proceeds of sale, the plaintiffs are not in such relation to the property as to entitle them to apply for such relief. In other words, the possession of the property being held adversely to the claim of the plaintiffs, a court of equity cannot grant relief in such case, but the remedy, if the parties be entitled to any, must be by action at law. It is clear, the bill is filed upon the assumption that the legal title to the property claimed is in the plaintiffs, and the bill therefore presents the case of parties out of possession, claiming the legal title to the property in question, and therefore seeking to oust the parties in possession, who also claim the legal title, and to compel an account for rents and profits. This objection, among others, was sustained by the court below upon the authority of Hipp *v.* Babin, 19 How. 271; Killian *v.* Ebbinghaus, 110 U. S. 573; Moore *v.* Shannon, 6 Mackey, 157; Freeman on Cotenancy and Partition, sec. 446; 2 Lead. Cas. Eq. (Agar *v.* Fairfax), pp. 900–903; 3 Pom. Eq., secs. 1387, 1388. It is supposed and contended by the defendants that this is nothing more in substance and legal effect than an ejectment bill; that the title, according to the allegations of the bill, is merely legal, and that there is no sufficient matter or circumstances stated to show the necessity for resorting to a court of equity. It is certainly the well-established doctrine of a court of equity, that it will not entertain suits for establishing legal titles, and that such doctrine is founded upon the clearest reason; "and the departing from
that practice, where there is no necessity for so doing,
76 would be subversive of the legal and constitutional distinctions between the different jurisdictions of law and equity." Hipp *v.* Babin, *supra.* And it is equally well settled that "where a party has a right to a possession, which he can enforce at law, his right to the rents and profits is also a legal right, and must be enforced in the same jurisdiction. The instances where bills for an account of rents and profits have been maintained are those in which special grounds have been stated, to show that courts of law could not give a plain, adequate, and complete remedy." *Ib.* Indeed, the case of Hipp *v.* Babin presents several features of close analogy to those presented in this case. And with respect to the matter alleged as constituting a cloud upon the title, it is well settled, that only those having a clear legal title, *with the possession*, can ask a court of equity to remove a cloud on title. Orton *v.* Smith, 18 How. 263. The matter alleged to create a cloud upon the title is apparent of record, open to the view and inspection of every one, and presents only a question of law as to the legal effect of the instruments. The plaintiffs claim a legal title, asserting that these instruments of record are utterly void and

without effect, and their right to succeed depends upon such legal title, without regard to any equitable right under the contract of sale, or any title or interest that may be asserted by the defendants. It is conceded, if the plaintiffs have not a legal title to the property claimed by them, they have no right at all.

But, without further considering, and without deeming it necessary to decide, this preliminary or jurisdictional question, we shall proceed to consider the questions arising upon the merits of the case; and these questions are—

1st. Whether the power of attorney of the 23d of May, 1859, made and executed by Robert Ransom and Mary H. Ransom, his wife, to George Gibson Huntt, and which remained unrevoked by any express act or declaration of the principals, invested the nominated attorney with such legal authority as to enable him to bargain and sell, and thereupon to convey, or to contract to convey, by deed of bargain and sale, the property therein mentioned and referred to?

2d. If the power was valid and enabled the attorney to bargain and sell the property at the time it was made, whether the subsequent occurrence of the civil war, and the principals going into the seceded States, and remaining there during the war, and the husband becoming an active participant in the war against the Union, had the effect to revoke and render null the power of attorney, and thereby to destroy all authority previously vested in George G. Huntt to deal with the property of his principals?

3d. But, supposing the power of attorney to be valid, and that it remained valid, notwithstanding the occurrence of the war, was the deed of the 29th of November, 1864, an effective execution of the power, or authorized thereby, so as to vest in the purchaser of the property a title, either legal or equitable?

4th. If the deed made under the power was not valid as a deed of conveyance by the then existing law, was it cured and made valid by the act of Congress of March 3, 1865, entitled "An act to quiet titles in favor of parties in actual possession of land in the District of Columbia."?

5th. If this act of 1865 does not apply, and the deed made by the attorney of the 29th of November, 1864, does not operate as a conveyance of the legal title, is there such equity in the defense, and on the facts of the case, as will bar and preclude the relief sought by the plaintiffs?

1. With respect to the first of these questions, it is doubtless the case, that in most, if not all the States, there are statutes authorizing the wife by joining in deed with her husband, and by separate or privy acknowledgment of the wife, to convey her real estate. But whether by statute or otherwise, it has been the custom in this country from its earliest history, for the wife to convey her real estate by the joint deed of herself and her husband. In most, if not all the States, there have been statutes prescribing certain conditions and formalities for the conveyance of the wife's real estate; such as the separate acknowledgment from her husband; such acknowledgment of the deed being regarded as one of the most essen-

tial acts to give validity to the deed. And where the prescribed forms have been complied with, the nature and extent of the estate conveyed, and the objects and purposes thereof, are unrestricted; and the courts have been liberal in supporting the right to convey. Hence a married woman may mortgage as well as unconditionally alienate her real estate, by joining her husband in the conveyance and making the acknowledgment, and this, though no part of the consideration may pass to her; and thus she may subject her real estate to the risk of complete alienation by foreclosure for her husband's debts, or by sale under a power of sale therein conferred. It is settled that *she may thus create a valid power in the mortgage to sell* in default of payment; and so she may convey upon condition, and prescribe the terms of the condition; and thus greatly depart from the old common modes and forms of conveyance of *femes covert* by fines, and common recoveries. 2 Kent Com. 150, 151, 167; Swan *v.* Wiswall, 15 Pick. 126; Whiting *v.* Stevens, 4 Conn. 44; McCullough *v.* Wilson, 21 Penn. St. 436; Black *v.* Galway, 24 Penn. St. 18; Schouler, Hus. and Wife, sec. 176.

At the common law, the conveyance of a *feme covert*, except by some matter of record, was absolutely void, and in England, until the St. 3 & 4 W. 4, ch. 74, abolishing fines and recoveries, a *feme covert* could only pass her freehold estate, not held as her separate estate, by fine or common recovery. In Maryland, however, whose laws in force in 1801 were adopted for this District, and are still in force here, except where changed or modified by acts of Congress, the substitution of the ordinary deed of conveyance by the wife for fine or common recovery, was made by the colonial statutes of 1715, ch. 47, 1752, ch. 8, and 1766, ch. 14; and the ceremony of private examination of the *feme covert*, and her voluntary acknowledgment of the deed, were made substitutes for the private examination as to her voluntary consent in the levying of the fine or recovery.

By the act of 1715, ch. 47, after declaring what nature of conveyances should be made, executed and recorded, in order to
77 pass any freehold, or an estate for a term of more than seven years, then provides, that when the grantors or bargainors may live remote from the court or officer required to take the acknowledgment, in the county where the land was situated, such acknowledgment was authorized to be taken where the grantor or bargainor lived; and it is then further provided, that "*if any such grantor or bargainor* of any lands or tenements, etc., shall happen to be out of the province, etc., at the time of the ensealing such writing, so as the same cannot be acknowledged, as is before directed, or enrolled within the time for that purpose hereinbefore limited, that *in every such case* such lands or tenements as aforesaid shall be acknowledged by *a letter of attorney*, well and sufficiently proved, etc., anything hereinbefore contained to the contrary thereof notwithstanding." And in a succeeding section of the same act, it is provided, "that if any *feme covert* be named as grantor in any such writing *indented* (the indenting is dispensed with by act of 1794, ch. 57) the same shall not be in force to debar her or her heirs, except upon her acknowledgment of the same, and the person taking such acknowl-

edgment shall examine her privately out of the hearing of her husband, whether she doth make her acknowledgment of the same willingly and freely, and without being induced thereto by fear or threats of, or ill usage by her husband, or fear of his displeasure." This acknowledgment is required to be reduced to writing and certified by the judge or justice taking the same, and it is required to be recorded, and which acknowledgment so made shall bar the *feme covert* and her heirs. And so by the act of 1766, ch. 14, it is provided that *any person or persons* conveying land and not living within the province, so that the deed cannot be acknowledged as previously directed, then and in every such case the deed or conveyance shall be acknowledged by *letter of attorney*, well and sufficiently proved, etc. And in a succeeding section of this last-mentioned act, it is provided that any *feme covert* joining with her husband in any of the several kinds of conveyances thereinbefore mentioned, and acknowledging them upon private examination, according to the form and direction of the previous act of 1715, where such *femes covert* have the right, title or interest of the lands, or any part thereof, intended to be conveyed, shall, by such execution, examination, acknowledgment and enrollment, be barred and foreclosed to all intents and purposes whatsoever. These provisions of the acts of 1715 and 1766 were in force in this District in 1859, and are still in force, and they were in no respect repealed by or in conflict with the acts of Congress of the 31st of May, 1832 (4 Stat. 520), and of the 20th of April, 1838 (5 Stat. 226), relating to the execution and acknowledgment of deeds for land in the District of Columbia. The acts of Congress do not profess to repeal the acts of Maryland of 1715 and 1766, or to be exclusive in their operation; but they have, in some particulars, not involved here, amplified and extended the provisions of the former statutes then in force. And construing these statutes altogether, and looking to the reason and policy upon which they are founded, it would seem to be clear that in the year 1859 and down to the year 1865, it was competent to a *feme covert*, by a joint power of attorney with her husband, duly executed and acknowledged according to the forms prescribed by the statute, to execute and acknowledge a valid deed of conveyance of her real estate situate in the District of Columbia. It is well settled that a power to convey land must possess the same requisites, and observe the same solemnities in execution and acknowledgment, as are necessary in a deed directly conveying the land; and that a title to land can only be acquired and lost according to the laws of the place where the land is situated. Clarke *v.* Graham, 6 Wheat. 577. In this case, the property to be conveyed was specifically mentioned and described in the power of attorney; and the power of attorney was executed and acknowledged at Carlisle, in the State of Pennsylvania, by husband and wife, under their hands and seals, and the acknowledgment and authentication of the instrument was in all respects in accordance with the provisions of the statutes in force in the District of Columbia, providing the manner and form in which the real estate of *femes covert* could be conveyed. Indeed, we do not understand that the statutory requirement in respect to the form of

acknowledgment and authentication thereof, is a matter of objection. The terms of the statutes, any "grantor or bargainor of any lands or tenements," being out of the province; or "any person or persons conveying," etc.; not residing in the province at the time, etc., may acknowledge said deed by letter of attorney, well and sufficiently proved, etc., are sufficient to embrace *femes covert*, authorized to sell and convey their real estate. If not, then the husband could not sell and convey by power of attorney, free of the contingent right of dower of his wife, for if the wife could not acknowledge by power of attorney a deed for the conveyance of her own real estate, she would be equally unable to acknowledge, by power of attorney, a deed for the relinquishment of dower in the lands of her husband. Such disability, we think, was never intended by the legislatures passing the statutes to which we have referred, to be fixed upon *femes covert*, having lands with right to convey the same.

But even in the absence of any express statutory authority, for the execution and acknowledgment of a deed of a *feme covert* by power of attorney, seeing that *femes covert* have full and complete right to convey their real estate by the joinder of their husbands in the deed, the power to execute and acknowledge deeds of conveyance by power of attorney, jointly executed by husband and wife, with the private examination and acknowledgment by the wife, as in the case of a deed of conveyance jointly executed by them, would seem to be reasonably implied, and it is difficult to perceive any good reason why it should not be allowed. It certainly subserves the convenience of parties; and we may well suppose, from the frequency of the occurrence of such powers in reported cases, that many titles are dependent upon the existence of the power of *femes covert* to make and acknowledge deeds of conveyance by attorney.

78 That such power exists in *femes covert*, with general right to convey their real estate, would seem to be the view entertained by writers of high authority. In Story on Agency, sec. 6, the author says: "In regard to married women, ordinarily, they are incapable of appointing an agent or attorney; and even in case of a joint suit at law, an appointment of an attorney by a married woman is void, and her husband may make an attorney for both. But where a married woman is capable of doing an act, or of transferring property or rights with the assent of her husband, there, perhaps, she may, with the assent of her husband, appoint an agent or attorney to do the same." And so Professor Washburn, in his work on Real Property, vol. 3, pages 232, 233, says that it is laid down, unqualifiedly, in some of the States, that a married woman cannot make a valid power of attorney, even jointly with her husband, to make a deed of her interest. "But," says the author, "it is difficult to perceive any reason for the rule where she can do the principal thing herself; and such a right is clearly recognized by statute in Massachusetts; and a similar right is also recognized by statute in New York."

The case of Holladay *v.* Daily, 19 Wall. 606, cited and relied on by the plaintiffs, would not seem to have much application to this case, though the principle of implied right in the wife, jointly with

her husband, to constitute an attorney to convey her estate, is clearly recognized. In that case, Holladay and his wife gave to one Hughes a power of attorney to sell and convey certain real property, the title to which was stated in the power to be in Holladay. Hughes sold and conveyed the premises in the name of Holladay alone, and as his attorney. The question presented was whether the deed thus executed in the individual name of Holladay, and not in the joint names of himself and wife, was sufficient to pass *his* title; and the court held that it was. In the course of the opinion, the court said—assuming that, without a statute of Colorado, authorizing the making of such power of attorney—"The authority of a married woman to convey, in connection with her husband, which is conferred, implies a power to appoint an attorney for that purpose—and there are adjudged cases which proceed upon that theory—we do not see any objection to the validity of the deed actually executed in the name of Holladay alone, or to its operation in passing the title."

But what is more immediately in point on this question, is the recognition of the right to make such power of attorney, by the act of Congress of March 3, 1865, passed for curing defects and quieting of titles in this District. By that act, the pre-existing right of a married woman, owning land in this District, to appoint an attorney jointly with her husband to convey such land, is expressly recognized, and any defects therein, or in the execution thereof, cured. After enumerating various defects in conveyances intended to be cured by the act, such conveyances are declared valid, provided, "that when the power of attorney shall have been executed by a *feme covert* the same shall be effectual and sufficient, if there shall have been such an acknowledgment of the same as would be sufficient, under the provisions of this act, to pass her estate and interest therein were she a party executing the deed of conveyance," etc. In this case, as we have already seen, the wife jointly with her husband executed the power of attorney, and she was separately examined from her husband, and made her acknowledgment in due form.

Upon the whole, we are clearly of opinion that the power of attorney was valid and sufficient to enable the attorney therein named to sell and convey the real estate of the *feme covert* therein described.

2. The next question is, as to the effect of the civil war upon the power of attorney—whether the power of attorney was thereby revoked, or its execution suspended during the war. This depends upon the nature of the duties to be performed under and in execution of the power. For it is well settled that the occurrence of war between the States or nations to which the respective parties belong does not necessarily annul and destroy all prior contracts subsisting between such parties. It is true, all trade, and private business intercourse, between the citizens or residents of the one belligerent State or nation with those of the other belligerent State or nation, is illegal and therefore void. But this principle is not so general and extensive as to include all contracts and engagements entered into *before* the war. There are some prior contracts that, from their very

nature, the subsequent occurrence of war will avoid; but those are contracts that necessarily require intercourse and communication between the citizens of the belligerent States, in order to the due performance of such contracts. In such cases, both upon principles that are universally observed and enforced as between belligerents, and as matter of necessity, the contracts are vacated by the occurrence of war between the States to which the different parties belong, because they cannot be performed, consistently with law. But that is not the case here. In this case, as we have already stated, the property, situated here in the city of Washington, was owned and held by parties as tenants in common. It was unimproved, and the question when it could be advantageously sold was, as we may well assume, a matter of great uncertainty. The parties appointing the attorney contemplated an absence, and they made the power without any limitation as to the time of its duration, or the time within which it should be executed. The power recites and declares as follows:

"To provide for the contingency of our absence, we the said Robert Ransom, Jr., and Mary, my wife, do by these presents constitute and appoint, and in o ir place put and depute the said George Gibson Huntt, of Washington city aforesaid, to be our true and lawful attorney-in-fact, for us and in our name, place and stead, to control, manage, grant, bargain and sell, and, in that event, convey all our right, title and interest in and to the said lots and square of ground, or any part or parts thereof, or to join in and for us and in our name to sign any proceedings in partition of the said lots and square, or to appear for us in court for that purpose. And in regard to the said real estate, to do, execute and perform, every act and thing necessary to be done as fully and amply as we might or could
79 do, if pers nally present. And we do hereby ratify and confirm all and whatsoever our said attorney-in-fact may legally do in the premises."

Language more comprehensive and unrestrictive could hardly be employed. And the power could well be executed without any communication or intercourse whatever with the principals making the power. The execution of the power no more required intercourse or communication with the principals than did the exercise of the power of sale in the case of The University *v.* Finch, 18 Wall., 106. In that case the question was as to the execution of the power by a person in whom a trust had been reposed, before the commencement of the war, in regard to real estate, and where the land, the trustee or donee of the power, and the *cestui que trust.*, were all within a State whose citizens were loyal and supporting the Union, while the grantors in the deed of trust, the donors of the power, were citizens and residents of one of the States declared to be in insurrection at the time of the sale, which was made while the war was flagrant; and it was held that the existence of war did not defeat the execution of the power. The right of an owner of real estate, situate within territory or part of a State over which the United States had unobstructed jurisdiction and control, to appoint an agent and invest him with authority to superintend and manage the estate,

though the owner, during the time, resided in one of the insurrectionary States, was recognized in the case of The United States *v.* Lee, 106 U. S. 196; and the principle was fully recognized and clearly stated by Mr. Justice Washington, in the cases of Conn *v.* Penn, Pet. C. C. 496, and Dennison *v.* Imbrie, 3 Wash. C. C. 396. In the case of Buchanan *v.* Curry, 19 John. 137, it was held by the supreme court of New York, that it was not unlawful for a citizen of that State to pay a debt, or perform a contract with an *alien enemy*, during war, if the payment or performance was made to the agent of such alien enemy *within that State—the contract having been made before the war.* And if the money so received by the agent be transmitted by him to the principal, without the debtor's connivance, the latter will not be responsible for it. The three cases last mentioned were all referred to with approval by the Supreme Court of the United States, in the case of Insurance Co. *v.* Davis, 95 U. S. 425, 429, 432. In the case of Ins. Co. *v.* Davis, just mentioned, the subject is quite fully discussed, and in considering the effect of war upon a power of attorney made prior to the commencement of hostilities, the court says:

"Emerigon says, that if a foreigner is forced to depart from one country in consequence of a declaration of war with his own he may leave a power of attorney to a friend to collect his debts, and even to sue for them. Traite des Assurances, vol. 1, 567. But though a power of attorney to collect debts, given under such circumstances, might be valid, it is generally conceded that a power of attorney cannot be given during the existence of war, by a citizen of one of the belligerent countries resident therein, to a citizen or resident of the other; for that would be holding intercourse with the enemy, which is forbidden. Perhaps it may be assumed that an agent *ante bellum*, who continues to act as such during the war, in the receipt of money or property on behalf of his principal, where it is the manifest interest of the latter that he should do so, as in the collection of rents and other debts, the assent of the principal will be presumed, unless the contrary be shown; but that, where it is against his interest, or would impose upon him some new obligation or burden, his assent will not be presumed, but must be proved, either by his subsequent ratification or in some other manner."

In this case there is nothing to show in the slightest manner that the principals in the power of attorney were damnified or prejudiced by the execution of the power, or that it was against their interest that the power should be executed by effecting a sale of their interest in the property. On the contrary, under the then existing circumstances, a sale was necessary as a means of realizing anything for their interest in the property. The property was entirely unproductive, being unimproved. It was liable for taxes, and taxes were in arrear; indeed, the undivided interest of the Huntt heirs had been sold for taxes, and bought in by Mr. Tayloe. It was, moreover, subject to confiscation by the Government to the extent of the life interest therein of General Ransom, the husband; and it was the right of the other parties in interest to have partition of the property, and to have their respective interests reduced to severalty

if not to have a sale for purposes of partition. Willard *v.* Willard, 145 U. S. 120. And the fact that the principals in the power of attorney were absent and within the Confederate lines would not have prevented effective proceedings for that purpose (University *v.* Finch, 18 Wall. 106); so that they were unable to retain their interest in the property in its original undivided condition. It was, therefore, rather to the interest of Ransom and wife than otherwise, that their interest in the property should be sold. In addition to this, there was approval and ratification of the sale by the receipt of the purchase-money.

We can perceive no sufficient reason, therefore, for holding that the power was either revoked or suspended by the war, or that its execution by sale of the property was prejudicial to the interest of the principals giving the power.

3. We come now to the question, whether the deed or instrument of the 29th of November, 1864, made by the attorney, George
80 Gibson Huntt, to Benjamin Ogle Tayloe, was such deed of bargain and sale of the interest of Mrs. Ransom and her husband in the property, as to bar and preclude those parties from making further claim thereto. And this presents the question, What is the true nature of the instrument? Is it a conveyance operating as a grant of the legal estate *in præsenti*, or is it only a contract for a further conveyance, contemplating a more formal and effective deed for the conveyance of the legal title? On the part of the defendants, it is contended that the instrument, though not in the ordinary form, is good and effectual as a deed of bargain and sale. While, on the other hand, it is contended by the plaintiffs, that the instrument is nothing more than a contract for a future conveyance to be executed by the principals in the power of attorney.

It is quite true, it requires no special formality to create a good deed of bargain and sale. If the deed be executed with the requisite solemnity, as prescribed by the statute, and contain words expressive of a present intention to convey and transfer the estate without further ceremony, it will, ordinarily, be sufficient. The conveyance by bargain and sale, as we know, had its origin in the ordinary contract of bargain and sale, enforcible by the court of chancery. The words bargain and sale, however, are not necessary to make it a bargain and sale, within the statute; but any words at common law, that upon a valuable consideration *would have raised a use*, will be sufficient to create a bargain and sale within the statute of uses. Gilbert on Uses, 493; Tud. Lead. Cas. 265; 2 Washb. R. Pro. 392.

The instrument here is executed as a deed, though not in the regular or usual form of a deed of bargain and sale. And while the power is referred to in the body of the instrument, the latter is signed, sealed and acknowledged as the deed or contract of the attorney, and not as that of the principals. The amount of the consideration is mentioned, and the fact of its full payment is recited; and it is then declared by the attorney executing the deed, that *he* thereby bargained and sold to said Benj. O. Tayloe, his heirs and

assignees, all the right, title, and estate of his principals, naming them, in the property described, including square No. 53, the property in controversy. The instrument then concludes in these terms: "And I hereby further agree in behalf of said Robert and Mary Ransom, that they shall and will, as soon as convenient, make and execute a proper deed of conveyance of said premises to said Benj. O. Tayloe, in fee-simple."

In our opinion this instrument has not the effect of a completed bargain and sale to convey the legal title to the property. Though it contains language sufficient to convey an estate *in præsenti*, yet, when taken in its entirety, it is very manifest that a further and more formal conveyance was contemplated. It would seem to be fully embraced by the principle of the cases of Jackson *v.* Moncrief, 5 Wend. 26; Grey *v.* Packer, 4 W. & Sergt. 18, and Ogdon *v.* Brown, 33 Penn. St. 249, cited and relied on by the plaintiffs. However, the making the sale, the receipt of the purchase-money, and the making and executing the deed or contract of sale, were acts fully within the scope of and authorized by the power of attorney, and were such acts as the parties had stipulated to ratify and confirm. Whether such contract could have been enforced as against the wife, either at law or in equity, is not the question presented in this case, and we therefore express no opinion upon that subject. On an application by the purchaser for the enforcement of the contract, questions quite different from those presented in this case would arise.

4. It is next contended, on the part of the defendants, that, whatever defect or imperfection may have originally existed in the instrument of the 29th of November, 1864, as an instrument of conveyance, that defect or imperfection was rectified and removed by the curative act of Congress of March 3, 1865, referred to in a previous part of this opinion. But in this contention we cannot concur. That act, by its terms, can only apply to and cure instruments intended as conveyances, and where the title was intended to pass, or was supposed to have passed, but the instruments proved to be defective or insufficient in the particulars specified. It was not intended to apply to an executory instrument or contract like that of the 29th of November, 1864. It was not intended to convert a mere contract of sale and purchase, having the effect to vest in the purchaser a mere equitable estate, into a legal conveyance, to transfer and vest in the purchaser the legal title to the estate. There is no provision in the act, that, by fair construction, can be made to apply to this instrument, and so far change its character as to make it effective to convey the legal estate in the property.

5. Lastly, however, the instrument, and the sale evidenced thereby, have effect, by operation of the settled principles of equity, to vest in the purchaser an equitable interest or estate. The instrument itself is inchoate or incomplete as a conveyance, and did not divest the owners and vendors of the legal title; but the bargain and sale, upon which the purchase-money was paid, created an equitable estate, which a court of equity will not divest out of the vendee, in

the absence of fraud. It is neither alleged, nor shown in proof by the plaintiffs, that there was fraud in the sale to Tayloe, or that the sale, at the time it was made, was for a price greatly inadequate; nor is it alleged or pretended that the purchase-money was not fully paid by the purchaser, as recited in the contract; and the proof shows that the purchase-money was paid over to Mrs. Ran-
81 som herself. And though Mrs. Ransom, after the close of the war, was in Washington, it is not shown that she ever objected to the sale, or that any person ever objected for her during her life. In such state of case, a court of equity *will not be active* in setting aside or vacating the sale. This is an application invoking the active interposition of a court of equity, in behalf of parties whose ancestor, under whom they claim, authorized the sale and received the purchase-money, not only to annul the sale, but to oust those claiming under the *bona fide* vendee from the possession of the premises sold, after the lapse of more than a quarter of a century, and after the property has greatly enhanced in value, and the entire square been greatly improved, so as to make the present value of the entire square, according to the testimony, to be about $250,000.

In the case of Mestaer *v.* Gillespie, 11 Ves., 621, 624, Lord Chancellor Eldon states a principle that would seem to apply to this case. His lordship, in the course of an opinion, discussing fully the doctrine of equity as applied to bargain and sale, said: "In the case, for instance, of a conveyance by bargain and sale, which cannot be complete as a legal conveyance without enrolment, under Stat. 27 Hen. 8, ch. 16, yet that very instrument, only inchoate, and not complete to pass the property, is in this court evidence of *an agreement to convey;* and the conscience is bound to make further assurance; that obligation *arising from the payment of the money.*"

In this case, the attorney was held out by the power signed and duly acknowledged by Mrs. Ransom, jointly with her husband, as competent to sell and convey the property; and having sold and received the money, the parties ought in equity and good conscience to be estopped from questioning the sale, in the absence of fraud; and if Mrs. Ransom was estopped, those claiming under her are equally so. In the bill, asking the court to declare both the power of attorney and the contract of sale null and void, without the allegation of fraud, there is neither the proffer to refund the purchase-money received, the many years of taxes paid, nor to allow for any proportionate part of the value of lasting improvements placed upon the property. The case would seem to be fully embraced by the general equitable principle well established, and which is clearly stated by Mr. Justice Story, in his work on Equity Jurisprudence, vol. 1, sec. 385. Where the author says: "In cases where one of two innocent persons must suffer a loss, and, *a fortiori*, in cases, where one has mislead the other, he, who is the cause or occasion of that confidence, by which the loss has been caused or occasioned, ought to bear it. Indeed, cases of this sort are viewed with so much disfavor by courts of equity, that neither infancy nor coverture will constitute any excuse for the party guilty of the concealment or

misrepresentation; for neither infants nor *femes covert* are privileged to practice deceptions or cheats on other innocent persons." And the learned author cites many authorities in support of the principle thus stated in his text.

This general principle of equity has been applied to various states of fact; and the Supreme Court of the United States have applied and enforced it in cases where the *equity* against alleged claims and supposed rights of married women, was certainly not stronger, or more manifest, than in the present case. The cases of Bank *v.* Partee, 99 U. S., 329, and Bein *v.* Heath, 6 How., 247, are instances, and furnish fair illustrations of the application of this general principle of equity as against the alleged claims and supposed rights of married women.

We are of opinion that the decree of the court below, dismissing the bill, was correct, and should be affirmed; *and it is so ordered.*

Decree affirmed.

82 TUESDAY, *October 1st, A. D.* 1895.

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FANNIE P. WILLIAMS, MARY H. BELL, Robert Ransom, Jr., James J. B. Ransom, Matt W. McCorkle, Henry H. Ransom, George G. Ransom, and Seymour H. Ransom, Appellants,
vs.
JOHN W. PAINE, ESTELLE T. PAINE, JOHN PAINE, OGLE TAYLOE PAINE.
} No. 421. April Term, 1895.

Appeal from the supreme court of the District of Columbia.

This cause came on to be heard on the transcript of record from the supreme court of the District of Columbia and was argued by counsel; on consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said supreme court in this cause be, and the same is hereby, affirmed with costs.

Per MR. CHIEF JUSTICE ALVEY.

October 1, 1895.

83 MONDAY, *November 18th, A. D.* 1895.

FANNIE P. WILLIAMS, MARY H. BELL, ROBERT RANSOM, Jr., JAMES J. B. RANSOM, MATT W. McCORKLE, HENRY H. RANSOM, GEORGE G. RANSOM, and SEYMOUR H. RANSOM, Appellants,
vs.
JOHN W. PAINE, ESTELLE T. PAINE, JOHN PAINE, OGLE TAYLOE PAINE.
} No. 421.

On motion of Mr. F. H. Mackey, attorney for the appellants in the above-entitled cause, it is ordered by the court that said appellants be allowed an appeal to the Supreme Court of the United States on giving bond in the sum of four hundred dollars.

84 Know all men by these presents that we, Fannie P. Williams, Mary H. Bell, Rob't Ransom, Jr., James J. B. Ransom, Matt W. McCorkle, Henry H. Ransom, George G. Ransom, and Seymour H. Ransom, as principals, and William F. Hellen, as surety, are held and firmly bound unto John W. Paine, Estelle T. Paine, John Paine, and Ogle Tayloe Paine in the full and just sum of four hundred dollars, to be paid to the said John W. Paine, Estelle T. Paine, John Paine, and Ogle Tayloe Paine or their certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 12th day of December, in the year of our Lord one thousand eight hundred and ninety-five.

Whereas lately, at a Court of Appeals of the District of Columbia, in a suit depending in said court between Fannie P. Williams, Mary H. Bell, Robert Ransom, Jr., James J. B. Ransom, Matt W. McCorkle, Henry H. Ransom, George G. Ransom, and Seymour H. Ransom, appellants, and John W. Paine, Estelle T. Paine, John Paine, and Ogle Tayloe Paine, appellees, a decree was rendered against the said appellants, and the said appellants having been allowed an appeal to the Supreme Court of the United States to reverse the said decree in the aforesaid suit, and a citation directed to the said appellees, citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington, within 30 days from the date thereof:

Now, the condition of the above obligation is such that if the said appellants shall prosecute said appeal to effect and answer all costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

FANNIE P. WILLIAMS, [SEAL.]
MARY H. BELL, [SEAL.]
ROBERT RANSOM, JR., [SEAL.]
JAMES J. B. RANSOM, [SEAL.]
MATT W. McCORKLE, [SEAL.]
HENRY H. RANSOM, [SEAL.]
GEORGE G. RANSOM, [SEAL.]
SEYMOUR H. RANSOM, [SEAL.]
By their attorney, FRANKLIN H. MACKEY. [SEAL.]
WILLIAM F. HELLEN. [SEAL.]

Sealed and delivered in the presence of—
ARTHUR R. COLBURN.

Approved by—
R. H. ALVEY,
Ch. Justice Court Appeals, D. C.

This bond is satisfactory to us.
CARLISLE & JOHNSON, *For Appellees.*

[Endorsed:] No. 421. Fannie P. Williams *et al.*, appellants, *vs.* John W. Paine *et al.* Bond on appeal to Supreme Court U. S. Court of Appeals, District of Columbia. Filed Dec. 16, 1895. Robert Willett, clerk.

85 UNITED STATES OF AMERICA, *ss:*

To John W. Paine, Estelle T. Paine, John Paine, and Ogle Tayloe Paine, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein Fannie P. Williams, Mary H. Bell, Robert Ransom, Jr., James J. B. Ransom, Matt W. McCorkle, Henry H. Ransom, George G. Ransom, and Seymour H. Ransom are appellants and you are appellees, to show cause, if any there be, why the decree rendered against the appellant should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Richard H. Alvey, Chief Justice of the Court of Appeals of the District of Columbia, this 16th day of December, in the year of our Lord one thousand eight hundred and ninety-five.

R. H. ALVEY,
Chief Justice of the Court of Appeals of the District of Columbia.

Service accepted this 16th day of December, 1895.
CARLISLE & JOHNSON,
Sol'rs for Appellees.

[Endorsed:] Court of Appeals, District of Columbia. Filed Dec. 16, 1895. Robert Willett, clerk.

86 Court of Appeals of the District of Columbia.

I, Robert Willett, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 85, inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Fannie P. Williams, Mary H. Bell, Robert Ransom, Jr., James J. B. Ransom, Matt W. McCorkle, Henry H. Ransom, George G. Ransom, and Seymour H. Ransom, appellants, *vs.* John W. Paine, Estelle T. Paine, John Paine, and Ogle Tayloe Paine, No. 421, April term, 1895, as the same remain upon the files and records of said Court of Appeals.

Seal Court of Appeals, District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 21st day of December, A. D. 1895.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: Case No. 16,165. District of Columbia Court of Appeals. Term No., 114. Fannie P. Williams, Mary H. Bell, Robert Ransom, Jr., *et al.*, appellants, *vs.* John W. Paine, Estelle T. Paine, and Ogle Tayloe Paine. Filed January 29th, 1896.

No. 114.

Brief of Mackey for Appts.

NOV 1 1897
JAMES H. McKENNEY
CLERK

Supreme Court of the United States,

OCTOBER TERM, 1897.

Filed Nov. 1, 1897.

FANNIE P. WILLIAMS ET AL.

v.

JOHN W. PAINE ET AL.

No. 114.

On Appeal from a Decree of the Court of Appeals of the District of Columbia.

BRIEF FOR PLAINTIFFS,

APPELLANTS.

FRANKLIN H. MACKEY,
Solicitor for Appellants.

WASHINGTON, D. C.:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1897.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

FANNIE P. WILLIAMS ET AL., APPELLANTS,

v.

JOHN W. PAINE ET AL., APPELLEES.

No. 114.

Brief for Appellants.

This is a bill (amended bill, Rec. 16) filed to obtain a partition or sale of square fifty-three (53), in the District of Columbia, in which the plaintiffs claim a one-sixth undivided interest in fee simple. The facts of the case are as follows:

George W. Peter, being seized, as the plaintiffs allege, in fee simple of said square, conveyed the same, together with other real estate, on the 23d of January, 1837, to Henry Huntt and Benjamin Ogle Tayloe in fee as tenants in common (Rec. 68). Henry Huntt died shortly afterward,—September, 1838,—leaving as his heirs at law his three children, Mary Huntt (afterwards Mary Ransom),

Fannie Huntt (afterwards Fannie Gibson), and George Gibson Huntt, to whom said land descended equally. On the 23d of May, 1859, Mary, who had in the meantime intermarried with Robert Ransom, Jr., joined with her husband in executing a certain instrument of writing purporting to give to George G. Huntt a power of attorney to control, manage, bargain, sell, and in that event to convey, &c., all their right, title, and interest in said land. This instrument is set forth in the record, at p. 21, as Exhibit J. A. L. No. 1. At the time of executing this paper Robert Ransom was an officer in the army of the United States, but on the breaking out of the war between the States he resigned his commission and was appointed an officer in the army of the Confederate States. He engaged actively in the war and soon rose to the rank of major-general.

In the summer of 1864 Walter S. Cox, now one of the judges of the supreme court of this District, but then practising law in Washington, was in correspondence with his relative, Mrs. Gibson, and "at her immediate request" undertook to find a purchaser for this square and the other lots of ground of which the Huntt heirs were seized as tenants in common with Benjamin Ogle Tayloe. He effected a sale, through a broker, to Tayloe. In his letter to Mrs. Gibson of July 27, 1864, offered in evidence by the defendants, he says (Rec. 51):

"DEAR FANNIE: Mr. Tayloe has furnished me a statement showing—

Payment of taxes by him amounting to....	$199 27
Which deducted from.....	2,500 00
Leaves a balc. of.....	$2,300 73

"Each share of this—one-third—would be $766.91. I thought he would pay one-half to you on receiving your deed, & the balc. to Gibson; but he thought it better,

and he is perhaps right, to pay each one of you his or her share *on receiving the deed from each.* He has therefore paid me your share and given me an authority on Mr. Riggs to pay the rest *on receiving the deeds.* This will relieve you of any responsibility *as to Minnie's* [Mary Ransom's] *share.* I suppose you would be rather embarrassed about disposing of it, and she can do what she pleases with it *when the war is over*," &c.

On November 26, 1864, he writes Mrs. Gibson (Rec. 51) that Mr. Tayloe "has agreed to pay Minnie's share as soon as Gibson will execute a formal *contract of sale*, in pursuance of the power of attorney from her and her husband. I enclose a paper, attached to the power of attorney, which he should execute in the same way as his deed, and as soon as I receive it I will send you Minnie's share."

Gibson Huntt was at that time an officer in the United States army. On receipt of the contract of sale referred to in this letter he executed it and it was returned to Washington, where it was recorded, and the money was remitted to Mrs. Gibson, who testifies (Rec. 39) that "it was all expended at her [Mary Ransom's] direction or turned over to her." She does not think she sent her any during the war and "never spoke to her on the subject" of the property. There is no evidence in the record that Mrs. Ransom ever knew the property was sold. The contract of sale executed by Gibson Huntt is set forth on page 23 of the record, and is as follows:

"Know all men by these presents, that I, George Gibson Huntt, by virtue of the annexed power of attorney to me from Robert Ranson, Jr., and Mary Ransom his wife, and for the consideration of the sum of eight hundred and twenty-three $\frac{33}{100}$ dollars to me in hand paid by Benjamin Ogle Tayloe, of the city of Washington, in the District of Columbia, receipt of which is hereby acknowledged, have bargained and sold to said B. O. Tayloe, his heirs and

assigns, all the right, title, and estate of them, the said Robert Ransom, Jr., and Mary Ransom, being one undivided third part of, in, and to those pieces of ground in the city of Washington aforesaid known and described as [here follows an enumeration of the property, including square 53] with the improvements and appurtenances; *and I hereby further* agree in behalf of said Robert and Mary Ransom, that they shall and will, as soon as convenient, make and execute *a proper deed of conveyance* of said premises to said Benjamin O. Tayloe in fee simple

"In testimony whereof I have hereunto set my hand and seal this 29th day of November, A. D. 1864.

"GEORGE GIBSON HUNTT. [SEAL.]"

The acknowledgment describes the paper as a "contract of sale" and it is acknowledged as such; it is also endorsed, "Contract of sale."

On the 21st of June, 1864, Benjamin Ogle Tayloe, being then a tenant in common with the Huntt heirs, obtained from the corporation of Washington a "tax deed" of the property, and on the 25th of February, 1868 (Rec. 25), he died, leaving a last will and testament (Rec. 68), whereby he devised all his real estate in fee and in common to his three daughters, one of whom, Julia D., afterwards (May 3, 1865) became the wife of the defendant John W. Paine. December 7, 1870, by a deed in partition executed by the widow and devisees of said Tayloe, said Julia D. Paine took whatever title the parties to said deed had to said square 53. The evidence of the defendant Paine shows that the property was vacant and unoccupied until some years after the date of this partition deed. On the 25th of February, 1872, Julia D. Paine died intestate, leaving surviving her her husband, John W. Paine, and three children, Estelle T. Paine, John Paine, and Ogle Tayloe Paine, all of whom are defendants to this suit.

Mary Ransom never made this deed of conveyance re-

ferred to in Gibson Huntt's contract of sale. She died intestate on the 7th of February, 1881, at New Berne, North Carolina, and her husband, Robert Ransom, who survived her, died January 14, 1892. The complainants, who are the heirs at law of said Mary Ransom, filed the original bill in this cause February 10, 1893, and the amended bill December 16, 1893. This bill, after setting forth the material facts as above given, alleges that the power of attorney purporting to have been executed by Robert and Mary Ransom to be void so far as it affects her title to said square 53, and makes the same averment as to the contract of sale of George G. Huntt. It claims that a one-sixth undivided interest in the property is vested in the complainants as co-tenants with the defendants, and charges that the defendant John W. Paine, who is tenant by the courtesy of an undivided five-sixths of said property, "since the death of Julia D. Paine, and about the year 1890, without the knowledge or consent of complainants, erected twenty-two large brick dwelling-houses upon said square, which said houses occupy the entire square, and each is now occupied by separate and distinct persons renting severally from said Paine by separate and distinct contracts, and said Paine is, and has been ever since, as complainants are informed and believe, receiving the rents and profits thereof, and has rendered no account to complainants of said receipts, though requested so to do."

The bill prays that the contract of sale be declared null and void as a cloud upon the title of complainants; "that the right of complainants to a one-sixth interest in fee as tenants in common of said square fifty-three be established against *all* the said defendants by decree of this court, as well the life tenant as said reversioners," and that a partition or sale may be had of the property, and closes with prayers for an account and for further relief.

Personal service of the subpoena to appear to the original bill not being obtainable against the defendants, an order of publication in the usual form was had, whereupon the defendants, "appearing specially," moved to quash the said order, which being overruled, a demurrer, set out on page 4 of the record, was filed.

This demurrer, after argument, was overruled and thereupon the defendant John W. Paine filed a separate answer, and his children a joint answer. *Mutatis mutandis*, the answers are substantially the same, so that a synopsis of one of them will be sufficient. Both of the answers are preceded with the following averment:

"This defendant, not admitting the jurisdiction of the court herein nor waiving his objection thereto heretofore made by his counsel specially appearing for that purpose, but expressly denying the jurisdiction of this court and insisting upon his objection thereto so as aforesaid heretofore made, and now and at all times hereafter saving to himself all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties, imperfections in the said bill contained, and not intending hereby to waive his demurrer to the said bill heretofore filed herein, but expressly insisting upon the same and answering said bill only under compulsion by the order of this court, for answer to the said bill or to so much thereof as he is advised it is material for him to make answer, answering, saith"

Th n proceeding to answer the bill he avers, *without denying that Henry Huntt died seized in fee of said square*, "that he has no knowledge and cannot therefore admit" the allegations of the bill, but that "whether he [Henry Huntt] was ever so seized or not, this defendant says that subsequent thereto and on June 21, 1864, the said Benj. Ogle Tayloe was sole seized in fee of the said

square fifty-three, and so continued sole seized in fee thereof until his death." This claim of sole seizin, as appears by the testimony, is made by virtue of the tax deed obtained by Tayloe on the date named, at which time he was admittedly a tenant in common with Henry Huntt's heirs. It is also proper to state that, on the argument below, counsel distinctly disclaimed any title by virtue of this deed.

The answer then proceeds to set up the power of attorney and the contract of sale heretofore referred to, and alleges the receipt of the purchase money with full knowledge of the facts by Mary Ransom. The death of Julia D. Paine, and that the children named are her heirs at law, are admitted; but it is averred that Julia D. Paine died seized of "the whole of said square," and that her husband, John W. Paine, is the tenant by the courtesy thereof. John W. Paine admits that he has erected the twenty-two houses as charged, and that he has collected the rents thereof and still collects them, and that said houses are in occupation of several and distinct tenants holding under him. *He does not deny* the allegation of the bill that these houses were erected *without the knowledge or consent of the plaintiffs.* He avers that if complainants have any right their remedy is plain and adequate at law, and claims the same advantage of this averment as if it had been specially pleaded. Further answering, he says that he and those under whom he claims have been in actual, open, &c., possession of said square, holding adversely to complainants for more than twenty years, and denies the right of complainants to any part of said square. He then avers that certain ejectment suits were brought against him by Robert Ransom in his lifetime, but were abandoned. The records of these suits are not before the court, however, the defendant having failed to file copies of the record.

The only effect which the averment can have is to show that Robert Ransom, in his lifetime, *did* claim an interest in this land, and was endeavoring to assert it at the time of his death. Lastly, the defendant sets up that his improvement of the land and payment of taxes, &c., were made in good faith.

Testimony was taken by both sides; but there is little or no controversy as to the material facts. The questions at issue are purely matters of law. It will hardly be contended that any adverse occupation, such as the law requires to bar the record title, has been made out, even if it be conceded that such a possession could avail in a case where the plaintiffs' right of action only accrued about a month before the bringing of the suit.

The court below dismissed the bill, and from that decree this appeal is taken.

Assignment of Errors.

1. The court erred in finding that the alleged power of attorney, dated the 23d day of May, 1859, from Robert Ransom, Jr., *et ux.* to George Gibson Huntt was a valid and sufficient instrument to pass the fee of Mary Ransom to the real estate therein described.

2. In finding that the paper dated the 29th day of November, 1864, and found on page 58 of the transcript of the record was a valid and sufficient instrument to pass the fee title of Mary Ransom to the real estate described therein.

3. In holding that said alleged power of attorney had not been revoked.

4. In holding that the act of Congress March 3, 1865, cured any of the alleged defects in the instruments mentioned in the 1st and 2d of these assignments of error.

5. In holding that said Mary Ransom, a married woman, was by said act empowered to convey her real estate by power of attorney, and that said act was retroactive.

6. In not holding that as neither the defendants nor those under whom they claim were in actual possession of said real estate on the 3d day of March, 1865, the said act of Congress of that date had no application to the instrument mentioned in the 1st and 2d assignments of error.

7. In finding that the purchase-money from the alleged sale of the land in controvery was received by said Mary Ransom.

8. In dismissing the bill of complaint.

9. In not granting the relief prayed for in said bill.

Before discussing the assignment of errors it would seem proper to first dispose of the question of jurisdiction raised by the defendants. Their objection in this respect is twofold. It is claimed:

1st. That the court has never obtained jurisdiction by proper process over the person or subject-matter.

2d. That even had such process been obtained the court has no jurisdiction to grant the relief prayed,—the remedy, if any, being at law.

THE MOTION TO QUASH THE ORDER OF PUBLICATION WAS PROPERLY OVERRULED.

We can scarcely conceive any ground of argument against this proposition. The Revised Statutes of the District, section 787, which has been adopted by the court as one of its rules—Rule 17—provides that "publication may be substituted for personal service of process upon any defendant who cannot be found in suits for *partition*," etc. The fact that this is a suit for partition seems to settle the question without argument.

THE DEMURRER WAS ALSO PROPERLY OVERRULED.

The jurisdiction of a court of equity to entertain this case is plain for a number of reasons:

1st. To avoid multiplicity of suits. The bill and the testimony show that there are twenty-two houses occupied by twenty-two different tenants holding under twenty-two separate and distinct leases. The defendants themselves are non-residents. Even, therefore, if the court had jurisdiction for no other purpose, it would maintain it to avoid the twenty-two ejectment suits that would otherwise be necessary to assert the title of the plaintiffs.

2d. A judgment in ejectment would be binding only on the life tenant; after his death, the entire litigation could be reopened by the reversioners, so that the remedy at law is neither adequate nor complete. Boyce v Grundy 3 Pet. 215

3d. The *only* method of obtaining an adjudication of the plaintiff's title binding upon the reversioners is in equity, by a bill in partition, and that such a bill can be maintained the authorities all agree.

"A decree [in partition] may be obtained where there are remaindermen who may come into esse and be entitled, for they will be bound by a decree made against the tenant for life." (White & Tudor Lead. Cas.; Agar *v.* Fairfax, vol. 2, pt. 1, p. 501, citing Wills *v.* Slade, 6 Vesey, 498, and Gaskel *v.* Gaskel, 6 Sim. 643.)

"The remedy [in partition] in equity is not confined to tenants in possession, but extends to all persons interested, whether presently, or in expectancy; and *remaindermen*, *reversioners*, infants and persons not in esse may be bound by the decree." (Pom. Eq., vol. 3, 1387, citing Lord Book *v.* Lord Hertford, 2 P. Wm. 518; Gaskel *v.* Gaskel, 6 Sim. 643; Hobson *v.* Sherwood, 4 Bear. 184; Wills *v.* Slade, 6 Ves. Jr. 498.)

"But while all persons interested in the land, whether in possession or expectancy, are proper parties to a bill for partition, only those in possession are entitled to file the bill." (Evans *v.* Bagshaw, L. R. 8 Eq. 469; Agar *v.* Fairfax, 2 Lead. Cas. in Eq. 880, 894; Striker *v.* Mott, 2 Paige, 387.)

"Where one owns an undivided share in fee he may have partition against tenant for life and remaindermen of the other undivided moiety [exactly our case] binding upon the remainderman." (Shaker *v.* Mott, 2 Paige, 387; Chan. Walworth, 1831; Woodworth *v.* Campbell, 5 Paige, 518; 1 Story Eq. Jur., secs. 656, 656a.)

The case of Moore *v.* Shannon (6 Mackey, 157), cited by Mr. Justice Hagner in his opinion in the court below, in nowise conflicts with the doctrine of these cases. On the contrary, it is in entire harmony with them. In that case a widow had been assigned as her dower a life estate in six out of a number of lots of ground of which her husband had died seized. While in the enjoyment of the life interest, some of the reversioners filed a bill against the other reversioners praying a partition or sale of the reversionary interest, and the court very properly held that reversioners could not maintain a bill in partition, which was exactly what was held in Evans *v.* Bagshaw, Striker *v.* Mott, and the cases cited in 2d Lead. Cas. in Eq., *supra*,—viz., that while all persons interested in the land are proper parties to a bill in partition, *only those having an interest in possession* are *entitled* to file the bill. In the case at bar the estate sought to be partitioned is held as follows: one-sixth in fee by the plaintiffs, and the other five-sixths by one of the defendants for life with the reversion in the other three defendants. If the reversioners had filed this bill to have their reversionary interest partitioned amongst themselves, of course they could not have maintained it; but the plaintiffs, who are not

reversioners, may file the bill and have their one-sixth share in fee set off to them, and to bind the reversioners by the decree they are made parties. Mr. Justice Hagner undoubtedly misapprehended the case before him. In his opinion, printed in the record, he seems to have overlooked the fact that the jurisdictional question had *already* been decided in this case by Chief Justice Bingham upon the demurrer, in which the very questions raised by the defendant—among them the fact of his being in possession and the plaintiffs out of possession—were made grounds of demurrer, and overruled by the court. For the purposes of the case before the court below, these questions were *settled*. The "law of the case" had been made by Chief Justice Bingham; for where a question of law is once determined in a case, it becomes the law of *that* case through all the subsequent proceedings and cannot be gone into again. This doctrine is as settled as the hills. (Wells Res Adjudicata and Stare Decisis, chap. 44.) But, conceding his right to go into that question, we submit that he was entirely wrong in holding that it was necessary for the plaintiffs to be in actual possession of the *locus in quo* before the jurisdiction in partition will attach. His citation in his opinion (Rec., p. 66) of the note to Mr. Pomeroy's text shows that the learned justice completely misapprehended the meaning of this word "possession" as there used. Mr. Pomeroy had stated in the text that the remedy in partition is not confined to tenants *in possession*, but extends to all persons interested, whether *presently* or in *expectancy;* then in a note it is said: "While all persons interested in the land, whether in possession or expectancy, are proper parties to a bill for partition, only those *in possession* are entitled to file the bill. The learned judge below takes this to mean *actual* possession—*a pedis possessionis;* but it is plain, from the

authorities we have already cited, as well as from the text of Mr. Pomeroy himself, that what is meant is an *interest in possession—i. e.*, a present interest as distinguished from an interest in expectancy. The very case cited by Mr. Pomeroy in support of the note shows this to be the meaning of his language. Thus in Evans *v.* Bagshaw (L. R. 8 Eq. 469), Lord Romilly, M. R., delivering the opinion, says: "It is unnecessary to go into this question of what *interest in possession* would entitle a person to file a bill. Here there was nothing more than a reversion and a charge on that reversion. The person entitled to *that* could not file the bill; and they cannot by afterwards *acquiring an interest in possession* set up a title which they had not originally." And in Agar *v.* Fairfax (2 Lead. Cas. Eq. 880), the other authority cited, the language is, "A person when *entitled in possession* only can file a bill for partition. It has been held, therefore, that a bill for a partition cannot be maintained by a joint tenant or tenant in common in *reversion or remainder*," citing Evans *v.* Bagshaw. So that the very authorities cited by the learned justice show that he has misapprehended the technical use of the word "possession" as applied to the rule under consideration.

Undoubtedly the general doctrine is that when the plaintiff is out of possession and his title is *disputed* by the defendant in possession, a bill in partition will not lie until the *legal* title has been determined by a court of law, and for that purpose the court will retain the bill until the case has been tried at law. This was held by the general term of the supreme court of this District, in Howard *v.* Howard, 20 Law Reporter, 804. But there are several, indeed a number of exceptions to the rule; thus the bill may be maintained:

1st. If the plaintiff claims an equitable title.

2d. If the *defendant* claims an equitable title.

3d. If the remedy at law is not adequate or complete.

4th. Where there are other equitable matters alleged in the bill as a ground of relief, in which case, as the chancellor must determine the title in order to afford relief upon these other grounds, he will not stop with partial relief but will go on and grant the partition prayed for.

5th. If the title set up by the plaintiff is not doubtful, a mere hostile claim on the part of a tenant in common will not oust the jurisdiction.

Let us see if the authorities sustain us in these propositions:

The first proposition, viz., that where the plaintiff's title is equitable the court will take jurisdiction because courts of law do not recognize such titles, is so well settled that we need not discuss it. The corollary of this, however, that when the defendants set up an equitable title the court will not send the case to law, because to do so would only postpone the litigation to the time when the plaintiff, having established his legal title, returns to equity praying a partition of the estate, has not been so often before the courts. But the cases, though few, are equally as conclusive. Their application to the case at bar will be perceived when we bear in mind the fact that the defendants set up as a defence, in case all others fail, that of an equitable estoppel; that is to say, that we are estopped to set up title because (as they allege) the ancestor of the plaintiffs received the purchase money.

"The defendant denies the title of the complainant to any interest in the property. Generally, in such cases, the practice is to retain the bill until the right can be tried at law. (Boone *v.* Boone, 3 Md. Ch. Dec. 497; Wilkin *v.* Wilkin, 1 Johns, 468.) But, as the point is to be determined in this case upon principles of equity, the

complainant having shown a legal title, *and the defendant relying upon a defence cognizable only in a court of equity*, if the court in which the partition is sought does not entertain the question of title, the defendant would be deprived of the benefit of her defence altogether, for none such as that relied on here could be made at law." (Campbell *v.* Lows, 9th Md. 500, at p. 508.)

In Foust *v.* Moorman (2 Ind. 17) it was held that in proceedings for partition, "when the question of title arises on an equitable title set up by *defendants*, the court of chancery will decide, for equitable titles belong to it and the parties cannot be sent to law."

And so the learned annotator of the American notes to White and Tudor's Lead. Cases in Equity, vol. 2, pt. 1, p. 903, says :

"It will be seen, then, that where the complainant's title is disputed on legal grounds *which are sufficient to occasion a reasonable doubt*, a chancellor will not take the determination of the question on himself and will either dismiss the bill or retain it until the point has been determined by some appropriate tribunal. When, however, the defendant alleges *an equitable title in himself*, or impeaches the plaintiff's right on equitable grounds, the question is *already before the appropriate forum*, and may be considered and resolved as a necessary though incidental step in the final determination of the cause."

In Holloway *v.* Holloway (97 Mo., at p. 643) the court, after determining that the mere fact that the plaintiff was not in *actual* possession of the property was not sufficient to oust the jurisdiction, say :

"Independently of this, the defendant, in his answer, discloses a fact which would authorize the exercise of jurisdiction in this case, in that the right or title charged to be in some other person than the plaintiff, while on its

face a legal title, is but an equitable one, to establish which it *might* be necessary to invoke the powers of a court of equity."

Our statute can have no meaning when it declared that in partition proceedings "the court may, in *addition* to the powers conferred by the act itself, exercise such powers as are or may be conferred by virtue of the general equity jurisdiction of the court," if the equitable question of the right of these defendants may not be determined and give jurisdiction to the court in this proceeding.

We have already shown that the remedy at law is in the case at bar inadequate for the reason that no judgment at law will bind the reversioners, so that we need not dwell further upon this aspect of the case. So, too, we think it too well settled for discussion that where there are other equitable matters set up in the bill than mere partition, the jurisdiction will attach. The right of the plaintiffs to have their title cleared of the clouds which these outstanding deeds have put upon it; their equity for an accounting; their equity to prevent multiplicity of suits, &c., are matters which give jurisdiction to the court beyond the mere question of partition.

Lastly, and perhaps the most important objection is that which seeks to oust the jurisdiction of the court because, in addition to the plaintiffs not being in actual possession, the defendants claim title in hostility to them.

There is no pretence that the adverse possession of the defendant has continued for such a length of time—twenty years—or has been of such a character that it would bar the plaintiff's right; and even had they had twenty years *continuous* occupation of the property, it would not avail them in this case, for it is conceded that Mrs. Ransom was a married woman at the time of the accruing of the de-

fendant's alleged title, and that after her death Gen. Ransom, by virtue of his courtesy estate, prevented the plaintiffs from ever setting up a claim to the possession until about a month before the bill was filed. The mere fact that a defendant in partition sets up an adverse possession will not be sufficient to oust the jurisdiction in partition when it plainly appears that the adverse possession thus set up is either short of the period required to bar the real title, or that because of coverture or some other disability on the part of the plaintiffs it cannot prevail against them.

The authorities are uniform on this proposition. Mere *possession* by the defendant, they say, does not prevent the jurisdiction from attaching, for *actual* possession by the plaintiff was never required if it appear that he has an immediate *right of entry.* Upon this point the following authorities would seem conclusive :

The Alabama code, sec. 1923, provides, as does ours, that—

" When an inheritance, or share of an inheritance, descends to several persons, they take as tenants in common, in proportion to their respective rights, unless it is otherwise provided by law."

And section 3588 provides :

" In suits for partition of lands, if the defendant denies the title of the complainant, the chancellor need not dismiss the bill, or delay the suit until a trial can be instituted and had at law, but may direct the issue as to the title of the complainant to be tried as other issues of fact are triable."

This is substantially the state of the law in this District, and the Alabama code only declares the law as it existed

prior to the statute. Now, when a party defendant in a partition suit sets up an adverse possession, the courts of Alabama, construing this statute, have over and over again declared that the adverse possession set up must be a possession for the period which the statute of that State requires (15 years) to ripen it into a fee title. Gore *v.* Dickenson, 98 Ala. 363 (decided 1892).

"Though complainants may have been out of possession many years, and the defendant in adverse possession excluding them, if such possession has not continued long enough to vest an indefeasible title under the statute of limitations, the court has jurisdiction to grant partition." (Berry *v.* Webb, 77 Ala. 507.)

In Math *v.* DeBardelaben (75 Ala., at p. 71) the court, in considering the question of adverse possession as a bar to partition, after holding that the adverse possession set up must be such as on its face, if true, would bar the real title, and that when such a claim appears on the face of the answer the question of fact thus raised will be remitted to a jury, go on as follows:

"We are not aware of any authority in England which declares that the disseisin of a tenant, not so long continued as to bar the right of entry, is an impediment to the exercise of the jurisdiction of the court. All controversies there arising as to the legal title, *if not determined by the court*, are regarded only as cause for staying proceedings and directing actions at law. (Porter *v.* Cerard, Ambler, 236; Baring *v.* Nash, 1 Ves. & B. 566; Gifford *v.* Williams, L. R. B. Eq. 494; Monroe *v.* Walbridge, 2 Ark. 410.) What is the weight of authority prevailing in this country it is not necessary to discuss. We are inclined to the idea that the better opinion is that the mere circumstance of an adverse possession, *if the complainant has an immediate right of entry*, [which is the same as saying if the adverse possession claimed is of a less period of time than

that fixed by the statute] will not prevent the equitable jurisdiction from attaching." (Hawley *v.* Soper, 18 Vt. 320; Miller *v.* Dennett, 6 N. H. 109; Marshall *v.* Crehore, 13 Metcf. 462; Godfrey *v.* Godfrey, 17 Ind. 6; Howey *v.* Gosings, 13 Ill. 95; Overton *v.* Woolfolk, 6 Dana, 367; Obert *v.* Obert, 2 Stockton (10 N. J. Eq.) 98; Lucas *v.* King, ib. 277; Tabler *v.* Wiseman, 2 Ohio St. 207.)

The authorities also fully sustain the text; thus in Howley *v.* Soper (13 Vt., at p. 322) the court says:

"It is objected that the plaintiff was not entitled to partition without showing himself in actual possession with the defendant. And as the plaintiff rested his case upon the exhibition of paper title, and introduced no evidence of his actual possession, it should doubtless be taken that he had no such possession. But *actual* possession is not essential in such a case, provided the party is not legally *disseised*. (Morroe *v.* Walbridge, 2 Ark. (Vt.) 410.) And for this purpose a distinction is recognized between a mere possession of the plaintiff's share by a third person, or by the defendant, and a legal disseisin. Such possession may often be treated as a disseisin by the plaintiff's election,(as for the purpose of bringing ejectment,) when it is not conclusively so in contemplation of law. It would seem that even adverse possession, *short of the period* required to confer a title by the statute of limitations, does not always work such a disseisin as will oust the right to apply for partition. The instances to this effect, however, are where a *privity* has existed between the parties as parceners, joint tenants, or tenants in common of the estate, and the possession is rendered adverse by the claims of one party, made *in opposition to the ordinary presumptions of law*, just as in the case at bar the possession of the widow is always *presumed* to be in subserviency to the title of the heirs, for it is a title in *privity* with the heirs. In such a case the other party has been allowed to consider himself as still seized, and to demand partition, notwithstanding such adverse claim and possession. (Clapp

v. Bromagham, 9 Cowen 566; Barnard *v.* Pope, 14 Mass. 43)"

Shaw, chief justice of Massachusetts, in the case in 14 Metcf., at p. 464, reviews the law in that State, and declares it to be in consonance with the foregoing, and he says:

"The same rule is substantially adopted in other States, though there is some difference in the terms of their statutes regulating partition. (Smith *v.* Bustus, 6 Johns, 215; Clapp *v.* Bromaghan, *supra;* Lloyd *v.* Gordon, 2 Harr & McHenry, 260; 3 Fairf. 320.) The general result of the cases seems to be that, when the right of the party is not barred by lapse of time, by descent, cast, or otherwise, the process lies."

The case from 2 Harr & McHenry, 260, was a writ of partition at law, but it was set up as a defence that the defendant was in adverse possession, and therefore the writ would not lie until the title had been tried in ejectment. "If one parcener," said counsel for defendant, "disseise another, there can be no partition during the disseisin, but the party ousted must first bring his ejectment to recover possession. (Co. Litt. 167 *a*, Dyer, 79 *b*.)" But the court, Harrison, Ch. J., delivering the opinion, said:

"No possession of one tenant in common can bar a writ of partition of the other, unless it be an adverse possession, continued such a length of time as would take away the right of entry of the other, to wit, an adverse possession of twenty years."

The fact that the case was not in equity, we conceive, can make no difference. What the court meant was that, unless it was claimed the *possession* had continued for twenty years, there was no necessity to drive the plaintiffs to an action of ejectment.

In Overton's Heirs *v.* Woolfolk (6 Dana, Ky. 371) the defendants denied the title of the complainants and set up an adverse possession in themselves of the property, but the period of occupation was less than that required by the statute.

The court said:

"We know of no adjudged case in which the principle has been settled that the *bare fact* of an adverse holding of a part of the land by one joint tenant in common would be a good ground to defeat the jurisdiction of a court of equity in a bill for partition until after the right to possession was settled at law."

The court then discusses the question whether a mere *denial of the title* would oust the jurisdiction, and says it is only where the complainant's title "is doubtful or suspicious" that he will be sent to a court of law. If the complainant's title is clear, as it must be, when the only defence is that of a possession of less than 20 years, there is no ground for sending the case to a court of law. To the same effect is the language in Howey *v.* Gosings (13 Ill. 95), when Mr. Justice Trumbull, in delivering the opinion of the supreme court of the State, said: "There can be no doubt, however, that a bill in chancery lies for partition, notwithstanding an adverse possession, unless it has been continued sufficiently long to bar a recovery under the statute of limitations, *which is not pretended in this case.*" This language was quoted with approval in Cuyler *v.* Ferrill, 5 Circuit Court U. S., 1 Abt. U. S. Rep. 182.

In Lucas *v.* King (10 N. J. Eq. 277) we quote, for convenience, from the head note:

"The *bare denial* of the complainant's title is no obstacle to the court's proceeding with partition. The

defendant must answer the bill, and if he sets up a title adverse to the complainant, or disputes the complainant's title, he must *discover* his own title. If, when the titles are spread before the court upon the pleadings, the court can see there is no valid legal objection to the complainant's title, there is no reason why the court should not proceed to order the partition. But where there are *serious* questions, both of law and fact, involved in the controversy between the parties as to the title, the court retained the bill and gave the parties an opportunity of settling the title at law."

The Ohio statute of partition provides "that all joint tenants, tenants in common, and coparceners of any estate in lands," &c., may have partition, and the court in Tabler *v.* Meriman (2 Ohio State, 211) said: "A right of entry is sufficient. If the tenant is not prevented, by an intervening estate, *i. e.*, is not a remainderman or reversioner from recovering the possession in an action at law, he ought not, and I think would not, be disabled to prosecute his writ of partition."

In Freeman on Co-Tenancy and Partition, sec. 450, the learned author says:

"The limitations attending proceedings in partition are constantly weakening and the tendency to do full and complete justice to the parties in one action is becoming irresistible. Wherever the question has recently arisen as a new question, the answer to which the courts were free to give without consulting decisions made at an early day when the common-law rules were more potent than at present, it has been resolved in favor of taking jurisdiction whenever the complainant shows himself *seized* of the requisite title, whether the lands sought to be partitioned are held adversely to him or not."

In Godfrey *v.* Godfrey (17 Ind. 6), heard on demurrer to the bill, it appears that the Indiana statute provides

that "all persons holding lands," &c., may have partition, and the court said it would not construe the word "holding" as requiring actual occupancy, but as equivalent to owning or having *title* to lands. We submit the same construction is to be given our statute which gives to "all tenants in common and coparceners of any estate in lands," &c., partition. It is not persons having *possession* but those having "any estate" with a right of entry in the lands, to whom partition is given.

We have already seen that in Maryland,—Campbell *v.* Lows (9 Md. 500, at p. 511),—in answer to the defence that complainant was not in actual possession of the property of which partition was sought, the court said, "It is clear that the complainant need only show his *title*."

With this array of authorities showing that a mere possession by one of the defendants is not sufficient to oust the jurisdiction in partition if the plaintiffs have an immediate right of entry, we are prepared to hear that our own court in general term has made a similar decision, and such it has in the case of Moore *v.* Shannon (6 Mackey, 157), in which the opinion of the general term was delivered by Mr. Justice Hagner himself, and which, though cited by defendant's counsel, so far from being in conflict with these authorities, is in thorough harmony with them. In that case, as we have seen, the widow being in possession of land which had been assigned her as dower, the reversioners brought a bill for a partition of their reversionary interest, and the court held that under our statute the party must be either seized *or* in possession of the land, citing Freeman Co-Tenancy and Partition. The court says: "It is a general rule prevailing in England, without exception, and also throughout the majority of the United States, that no person has the right to demand any court to force a compulsory partition unless he has

an *estate* in possession, one by virtue of which he is ENTITLED to enjoy the present rents, *or* the possession of the property as one of the co-tenants thereof." It is clear from this case that an *actual* possession is not necessary in this District if the complainant has a *right* to an actual possession.

The court, then, has jurisdiction to grant partition in this case not only because of the many equitable questions which arise in it, but because of the inadequate remedy at law—a judgment in ejectment not being binding on the reversioners—and because of the great number of suits which must be brought to settle the title at law, and also because those judgments when obtained would not prevent the defendant from setting up his alleged equitable title when the case returned to this court, and finally because there is no *doubt* of the *legal* title being in the plaintiffs.

THE OPINION OF THE COURT OF APPEALS UPON THE JURISDICTIONAL QUESTION.

The court below, without determining it, considered the jurisdictional question. It *seemed*, however, to lean against the plaintiffs' contention. In doing so it will be observed that the learned judge delivering the opinion ignored nearly every one of the points raised in this brief, thus—

1. He failed to note the distinction between a *right* of possession and an actual possession, yet he cites the very cases (Agar *v.* Fairfax, 2 Lead. Cas. Eq., Moore *v.* Shannon, and Freeman on Co-Tenancy) in support of the proposition that the possession must be actual which we have cited to show that *right* of possession is sufficient.

2. He ignores the fact that we are not seeking by this

proceeding to gain an *actual* possession of the property; we are asking merely that the defendants (our co-tenants, whose actual possession is constructively our possession) be required to make partition and account for our share of the rents and profits.

3. He ignores the fact that the remedy by ejectment at law by reason of the judgment in such action not being binding on the reversioners is not "a full and adequate remedy."

4. He ignores the fact that to proceed by ejectment would, as shown by the record, necessitate twenty-two separate and distinct actions against separate and distinct tenants—the defendant himself being a non-resident. Such a needless multiplicity of suits a court of equity would surely relieve against.

Any of these grounds would give jurisdiction to a court of equity, to say nothing of the *accounting* and other grounds set up in the bill.

Having, as we believe, established the jurisdiction of the court, we are now brought to a consideration of the matters set up in the *assignment of errors*.

First Assignment of Error.

1. The court erred in finding that the alleged power of attorney, dated the 23d day of May, 1859, from Robert Ransom, Jr., *et ux.* to George Gibson Huntt was a valid and sufficient instrument to pass the fee of Mary Ransom to the real estate therein described.

The consideration of this alleged error involves a consideration of all the other assignments of error.

The plaintiffs contend:

1st. That a married woman in this District, prior to the married woman's act, could not convey her real estate by power of attorney.

2d. That neither the Maryland statutes nor the act of Congress of March 3, 1865, have not changed the law so as to make valid powers of attorney executed by married women prior to that date.

3d. Because that statute applies only to parties in *actual possession* at the time of its passage, and it is conceded that no one was in such possession at that time.

4th. That even if the language of the act of 1865 were sufficient to cure the otherwise invalid instrument of this character, it could have no effect in this particular case, because the power of attorney itself had been long before *revoked* by the war.

5th. That even if the defects in the power of attorney were cured by the act of March 3, 1865, that act had no operation upon the "contract of sale."

6th. That even conceding that she received the purchase money she was not estopped, nor are her heirs estopped, to set up their title.

7th. That the equities of the case are with the plaintiffs.

We shall consider these questions in their order.

I.

A married woman could not, prior to 1869 (when the married woman's act was passed), *convey real estate* in this District by power of attorney.

But for the opinion of the court below we would have supposed no argument was needed to establish this proposition. Such was the rule at common law, and that law upon this subject, except as to the separate estate of married women, created by the act of 1869, remains in force here. See—

Halliday *v.* Daily, 19 Wall. 606.

Sumner *v.* Conant, 10 Vermont, 1.
Mott *v.* Smith, 16 Cal. 533.
Agricultural Bank *v.* Rice, 4 How. 225.
Rhea *v.* Rhenner, 12 Pet. 345.

This position is based upon the law that the only contract which a married woman could make in respect to her real estate was a conveyance of it by a deed in which she united with her husband. She could make no covenant in respect of it which bound her. She could not bind herself by an *agreement*, in which her husband joins, that she would sell. Plainly and exclusively the law declared that her only power in respect to her real estate was that she could not make any executory contract in respect of it, but that she could, by joining in a *deed* with her husband, convey the property to a purchaser. Under the law of England as it existed at the time of the Revolution, that was all that a married woman could do in respect to her real estate. There was something, however, in addition to the signing and executing of the deed jointly with her husband, and that something additional was that she had to make an acknowledgment before the proper officer that it was her deed, and he had to certify that the acknowledgment thereof had been made upon a privy examination of her, apart and out of the presence of her husband, in which she declared that she had executed it voluntarily and that she did not wish to retract it. Now, it is to be observed that this transaction—the only transaction which a married woman could make in respect to her real estate—was composed of two separate and distinct acts:

First, the making and executing a deed jointly with her husband.

Secondly, the privy acknowledgment by her before the officer authorized by law to take such acknowledgment.

But the Court of Appeals reached the conclusion that certain Maryland acts of ancient date gave this power (to convey by attorney) to married women, a fact which we venture to say was never before so understood either by the bar of Maryland or of this District. Indeed, the defendants' counsel, with all their distinguished ability, never thought of making this assertion in his brief in the court below.

The acts of Maryland referred to by the Court of Appeals are to be found in Kilty's Laws of Maryland, and, so far as they relate to the question under consideration, are as follows:

The act of 1715, chap. 47, is entitled—

"*An act for quieting possessions, enrolling conveyances, and securing the estates of purchasers.*"

The first seven sections need not be quoted; the remaining sections are as follows:

Sec. VIII provides that no manor's land, etc., "shall pass, alter, or change from one to another, whereby the estate of inheritance or freehold, or any estate for above seven years, shall be made or take effect in any person or persons, or any use thereof to be made, by reason of any bargain and sale only, except the deed or conveyance by which the estate shall be intended to pass," etc., be in writing and duly acknowledged and recorded, &c.

Sec. IX. "That when the grantor or grantors, bargainer or bargainers, of *such* lands, tenements or hereditaments, shall live remote from either the provincial court, or county court where the land lieth, it shall and may be lawful for such grantor or bargainer to acknowledge the same in the county where such bargainers live * * * and if any such grantor or bargainer of any lands or ten-

ements as aforesaid shall happen to be out of this province, within any of his majesty's dominions, at the time of ensealing such writing or writings indented, so as the same cannot be acknowledged, as is before directed, or enrolled within the time for that purpose hereinbefore limited, that in every such case such lands or tenements as aforesaid shall be acknowledged by a letter of attorney well and sufficiently proved either in the provincial or county court where such lands or tenements lie, or before one justice of the provincial court, or two justices of the county court as aforesaid and be enrolled as aforesaid."

Sec. X provides that such deeds shall take effect from the date of enrollment and not from the date thereof.

SEC. XI. "That if any *feme covert* be named as a grantor in any such writing indented, the same shall not be in force to debar her or her heirs, except upon her acknowledgment of the same, and the person or persons taking such her acknowledgment, shall examine her privately, out of the hearing of her husband, whether she doth make her acknowledgment of the same willingly and freely, &c., * * * and that the person or persons so examining her shall (in a note or certificate of the taking of the said acknowledgment) certify her examination and acknowledgment thereupon, and that such certificate be likewise enrolled upon record; in which case, and by such acknowledgments and certificates, *feme coverts* shall be barred, *and not otherwise.*"

The act of 1766 is entitled—

"An additional supplementary act to the act entitled 'An act for quieting possessions, enrolling conveyances, and securing the estates of purchasers,'"

and recites in the preamble that whereas the former act extended only to "such conveyances as operate" by way

of bargain and sale; and the good ends and purposes of said act are now in great measure eluded by the frequent use of conveyances by feoffment, lease and release, confirmation, release, limitation, and declaration of uses, and other modes of conveyancing, &c. The act then proceeds by apt language to extend the provisions of the act of 1715 to said deeds of feoffment, &c.

Section XI of the Act of 1715 plainly excludes the construction that Sections VIII and IX include *married* women within their purview. Section XI provides how married women shall make acknowledgment of deeds, but makes no provision for acknowledgment by letter of attorney. The previous sections (VIII and IX) refer plainly to persons *sui juris*. The same argument that would include married women within their purview would include infants, and other persons incapacitated by law to contract. Moreover the "letter of attorney" provided for was not to *sell and convey* land but merely to acknowledge a deed. Its purpose was to enable grantors, bargainors, etc., "out of the province" (and, therefore, unable to acknowledge them before the proper offices) to send their deed of conveyance *signed and sealed* and accompanied by "a letter of attorney" empowering the attorney to *acknowledge* the deed "in the provincial or county

The Court of Appeals, though referring to these ancient statutes of Maryland as authorizing a married woman to give a valid power of attorney to a third person to *make* a deed for her of her real estate, as well as to acknowledge it, do not seem altogether satisfied that these statutes alone would make the power of attorney in this case valid. It has recourse, therefore, to the act of Congress of 1865 (R. S., D. C., secs. 458–465), and the argument seems to be that as that act refers to powers of attorney of married women, it must be that these Maryland acts of 1715 and 1766 gave married women the power to make such instruments, otherwise the act of 1865 would be insensable. But this is a *non sequitur*.

What were these powers of attorney, executed by married women, which the statute was referring to? If we can readily construe the act of 1865 to apply to a class of cases in which by then existing law a married woman had the right to authorize her attorney to sell her real estate, it will not be necessary to *strain* the Maryland acts of 1715 and 1766 so as to give meaning to a statute passed a hundred or more years later. Now a power of attorney by a married woman authorizing a third person to convey her real estate could always be made by her if she held her estate (as she might do) with an unqualified power to dispose of it. In *that* class of cases a married woman has the right and power just as if she were a *feme sole* to appoint an attorney for the purpose of selling and conveying her estate. (See Adams' Equity, 45.) The act of 1865 could therefore well be construed to refer to this class of married women's equitable estates when it speaks of a power of attorney executed by a married woman.

Pom. Eq. Jur. Sec 1104

If there be two subjects to which a statute may be construed to apply, and it would apply to one without the violation of any principle of law or rule of construction, whereas the application of it to the other would be an outrage upon both, the court will not make the latter application.

II.

But the act of 1865 cannot, for another reason, be construed to apply to the case at bar, for it applies only to cases of parties in *actual possession;* and it is conceded that in 1859 the lot was a vacant one.

The Court of Appeals, in the case of Hevner *v.* Matthews (4 Ct. of Appeals 380), has recently construed in part the curative act of March 3, 1865. In that case it *refused* to express any opinion whether the words "in favor of

parties in actual possession," as found in the statute, are to be taken merely in connection with the barring of dower. Nor did it find it necessary so to construe it in the case at bar. We have now to submit that the words cannot so be taken. The statute, after enumerating the defects intended to be cured in deeds recorded prior to March 3, 1865, proceeds to declare such deeds—

"To be of the same effect and validity to pass the fee simple or other estate intended to be conveyed, *and bar dower in the real estate therein mentioned in favor of parties in actual possession*, claiming under and through such deeds," &c.

If the words in italics are to be taken as limited to the barring of dower, then if we take those words out of the statute the statute will read:

"Are declared to be of the same effect and validity to pass the fee simple or other estate intended to be conveyed, claiming under and through such deeds,"

which is unintelligible.

On the other hand, if we leave out the words "and bar dower in the real estate mentioned," and include the remainder, we have a complete and intelligible sentence, thus:

"Are declared to be of the same effect and validity to pass the fee simple or other estate intended to be conveyed in favor of parties in actual possession, claiming under and through such deeds."

This is certainly the meaning of the statute. Why should the condition of actual possession be limited to cases of dower only? The purpose of the act was curative and remedial. At the time of its passage many per-

sons *were in actual possession*, with valuable improvements erected thereon, of lands the titles to which depended upon defective deeds, and it was to cure the hardships of *such cases* that the statute was enacted. Its purpose was to protect the owners of homesteads and the improvers of property, not real estate speculators *in vacant lots* with defective titles. That it was only for the benefit of those persons who were *then* in possession is evident from the fact that the statute is admittedly not prospective, but entirely *retroactive*. It was not intended to benefit those who might *thereafter* purchase, at a depreciated price, defective titles to unoccupied property, and thereafter, by merely taking actual possession, claim the benefit of the statute and a largely increased price as a result. Such an act might well have been designated "An act to encourage speculation in defective titles."

In Hevner *v.* Matthews, the Court of Appeals has said in this connection: "Seizin is presumed to accompany title, and parties are presumed to be in possession under their deeds until the contrary is shown." This is a well-settled principle, but in whom is the *title?* Is it in the party claiming under the defective deed or in the party claiming under the perfect deed? The authorities have settled it that where two persons are claiming unoccupied property, the one under a perfect title and the other under a defective title, the constructive possession is in him who has the perfect title. The authorities are clear on this: "Both parties cannot be seized at the same time of the same land under different titles, and the law therefore adjudges the seizin of all, which is not in the *actual* occupancy of the adverse party, to him who has the *better* title."

Clarke *v.* Courtney, 5 Peters, at p. 354, where the whole doctrine is discussed.

See, also, Barr *v.* Gratz, 4 Wheat. 213, 233.
Armstrong *v.* Restau's Lessee, 5 Md. 280.
Hoye *v.* Swan's Lessee, *idem*, 237.
Steedman *v.* Hilliard, 3 Rich. (So. Cal.) Ct. of Appl. 101.

These authorities show that there can be no constructive possession when there is actual possession; the latter renders the former at once nugatory. A man claiming under a defective deed can *never* have a constructive possession, but he may have an actual possession, and the moment he takes that actual possession the constructive possession, which up to that time had been in the party claiming under the perfect deed, is gone. Where a statute, therefore, declares that a defective deed shall be deemed perfect *if the party is in actual possession*, it must necessarily exclude a constructive possession. Hence, to say that he has a constructive possession because the statute cures his deed, is to do nothing more than reason in a circle. So that it was not constructive possession but actual possession of the party claiming under the defective deed which was the *sine qua non* of the statute, and that there was no actual possession of this property by any one at the time of the passage of this act must be conceded.

But the court has said [actual] possession is presumed until the *contrary* is shown. In the case at bar we have complied with that condition. The testimony of the defendants themselves show that there was no *actual* possession of this property until long after March 3, 1865. M.. Paine testifies that it was *vacant* property until the erection of these houses in 1890. That he had never even rented the lot to any one until after the death of his wife, in February, 1872, and then only for short periods. We

submit, therefore, that Hevner *v.* Matthews in no way militates against the doctrine contended for in the case at bar.

III.

The power of attorney was revoked by the war.

Even if we concede the power of attorney to have been valid, the power was revoked as soon as the grantors of the power became incapacitated to do the act in person.

In 1864, because of the existence of war, General and Mrs. Ransom, residents of the Southern Confederacy, could not have bargained and sold and conveyed this property to Benjamin O. Tayloe, a citizen of the United States, residing in the District of Columbia. The agent could not do that which the principals themselves could not do. (Story on Agency, secs. 481–484.)

"That war suspends all commercial intercourse between the citizens of two belligerent countries or states, except so far as may be allowed by the sovereign authority, has been so often asserted and explained in this court within the last fifteen years that any further discussion of that proposition would be out of place. As a consequence of this fundamental proposition, it must follow that no active business can be maintained, either personally or by correspondence, *or through an agent*, by the citizens of one belligerent with the citizens of the other. The *only* exception to the rule recognized in the books, if we lay out of view contracts for ransom and other matters of absolute necessity, is that of allowing the payment of debts to an agent of an alien enemy when such agent resides in the same state with the debtor."

Insurance Co. *v.* Davis, 95 U. S. 429.
U. S. *v.* Lapene, 17 Wall. 601.
U. S. *v.* Lapene, 9 Ct. Cl. 31.
Hagner *v.* Abbott, 6 Wall. 532.

U. S. *v.* Grossmeyer, 9 Wall. 72.
Wash. University *v.* Finck, 18 Wall. 106.
Griswold *v.* Waddington, 16 Johns. R. 438.

In Hanger *v.* Abbott (6 Wall. 532), Mr. Justice Clifford, delivering the opinion of the court, said:

"As soon as war is commenced, all trading, negotiation, communication, and intercourse between citizens of one of the belligerents with those of the other, without the permission of the government, is unlawful. No valid contract, therefore, can be made, nor can any promise arise by implication of law from any transaction with the enemy. *Exceptions to the rule are not admitted.* And even after the war is terminated the defendant in an action founded upon a contract made in violation of that prohibition may set up the illegality of the transaction as a defence."

"A power of attorney from a person in a loyal State to one in the Confederate States to sell land in Tennessee was revoked by the existence of the war." (Conley *v.* Burson, 1 Heiskell (Tenn.) 145.)

"Where an agent was appointed in this State by a non-resident person to look after or act as agent for certain lots of land, with no other or general powers, and an attachment was issued against said non-resident owner and levied upon said lots, the agent by virtue of this authority was not authorized to confess a general judgment binding upon said defendant in attachment. *The war revoked the agency of a citizen of this State for a citizen of Massachusetts which existed when the war commenced without any act of revocation or renunciation by the parties.*" (Howell *v.* Gordon, 10 Ga. 302.)

"A general power of attorney to an agent to close up a business, *to sell real and personal estate*, to collect debts, and to do whatever is necessary to effect these objects does not authorize the agent to reinvest the funds of his principal; and such power of attorney executed before

the breaking out of the rebellion, after the contending parties have become, as against each other, belligerent powers, *ceases to have any vitality.* (Stoddart's Case, 4 Ct. Claims, 511.)

It will be observed that in Insurance Co. *v.* Davis (95 U. S. 429, *supra*) the court, while declaring it as a fundamental proposition that agencies of every sort are revoked by war, recognizes *one* exception to this rule, viz., that of allowing the payment of debts to an agent of an alien enemy when such agent resides in the same State with the debtor. A great number of such cases are to be found in the books, and all of these recognize the general doctrine while enforcing the exception. Thus in Wood *v.* Smith (7 Wall. 453) the court says:

"This rule," says Mr. Justice Washington, in Conn. *v.* Penn., "can never apply in cases where the creditor, although a subject of the enemy, remains in the country of the debtor, or has a known agent there authorized to receive the debt, because the payment to such creditor or his agent could in no respect be construed into the violation of the duties imposed by the state of war upon the debtor. The payment in such cases is not made to an enemy, and it is no objection that the agent may possibly remit the money to his principal. If he should do so, the offence is imputable to him and not to the person paying him the money."

We here cite a few cases where a power of attorney or agency to collect debts was held under this exception not revoked, while the general doctrine was recognized:

Sands *v.* New York Life Ins. Co., 50 N. Y. 626.
Manhattan Life Ins. Co. *v.* Warwick, 20 Gratt. 614.
Buchanan *v.* Corey, 19 Johns. R. 137.
Conn. *v.* Penn., 1 Peters, C. Ct., 496.
Denniston *v.* Imbrie, 3 Wash., C. C., 396.

By the act of July 17, 1862 (12 Stat. at L. 591, sec. 6), and the Proclamation of the President, issued in pursuance of it, July 25, 1862 (*id.* 1266), "all sales, transfers, or conveyances of the estate and property" of persons in rebellion after September 23, 1862, were made null and void.

In United States *v.* Lapene (17th Wall. 601) it was held under the non-intercourse act that an agency created while it was legal to create an agency *was revoked* as soon as the parties became residents of hostile portions of the country. "The agency to purchase cotton was terminated by the hostile position of the parties. The agency to receive payment of debts due to Lapene & Co. could well have continued. The purchase gave effectual aid to the enemy by furnishing him with the sinews of war. He was forbidden by the soundest principles of law. The purchaser obtained no title to the cotton."

In Washington University *v.* Finch (18 Wall. 106) the case was this: Daily and Chambers purchased of Elliot in March, 1860, certain real estate in St. Louis, Mo. For part of the purchase-money they gave their promissory notes, and conveyed the property in trust to Ranlett to secure the payment of these notes. Elliot assigned the notes of the Washington University, and on the 9th of December, 1862, being unpaid and due, Ranlett foreclosed the trust, the University being the purchaser. Daily and Chambers at the time of the sale were citizens of the State of Virginia and residing there during the war. After the war the validity of this sale was attacked on the ground that all intercourse between the people of loyal States and those residing in insurrectionary districts was prohibited, and that, by the laws of war, the complainants being forbidden to pay the debt, there could be no valid sale of the land for default of such payment. The court

held that the conveyance by the plaintiffs to Ranlett vested in him the legal title. That it was purely the case of the execution of a power by a person in whom a trust had been reposed in regard to real estate. The land, the trustee, and the *cestui que trust* all being, as they had always been, within a loyal State. That the power under which the sale was made was *irrevocable*. That the creditor had both the legal and the moral right to have the power made for his benefit executed. And the enforced absence of the complainants did not afford a sufficient reason for assisting his agent and the agent of the creditor in performing a duty which both of them had imposed upon him before the war begun. That its exercise required no intercourse, commercial or otherwise, with the complainants, and that the enemy, instead of being strengthened, would have been weakened by the process. This case, it will be seen, practically admits the doctrine contended for by us. The power of attorney in the case at bar was revocable. In Finch's case it was irrevocable. In one case it was the sale of the property of an enemy who was indebted to a citizen of the United States and the proceeds of the sale went to citizens of the United States. In the case at bar the proceeds of the sale went to the person in arms and holding a high military position in the armies of the Confederacy. In the Finch case, so far from aiding the enemy, he was weakened. In the case at bar the sale gave pecuniary aid and comfort to the enemy.

The Opinion of the Court Below as to the Effect of War Upon a Power of Attorney.

The court below, in discussing this question, made no distinction between powers of attorney coupled with an in-

terest and simple naked powers; that is to say, powers which the donor had the right to revoke. All such naked powers were revoked by the war, for the simple reason that when the act which a naked power authorizes another to do cannot be done by the donor himself that works a revocation of the power of attorney. It is otherwise with powers of attorney which are coupled with an interest or under which other parties have rights, such powers of attorney, for instance, as the donor himself could not revoke. Of course, such powers of attorney are not revoked by the occurrence of war. All the cases upon this subject recognize this distinction, holding that where the power of attorney is of such a nature that the donor himself cannot revoke it because there is coupled with the power an interest or estate which deprived the donor of the power to revoke it, that in such cases the war could not revoke it. Take a simple illustration: Prior to the war a holder of a bond or negotiable note had appointed an agent in the place where the obligor or maker resided to collect it; that gave to the maker or obligor the right to pay the debt in order to prevent the running of the interest upon such debt. Therefore, in such case, the breaking out of the war did not revoke the power of attorney of the agent residing in the same jurisdiction in which the debtor resided from accepting the payment of the debt from the debtor, though the creditor might be resident in the sovereignty at war with that in which the debtor resided. The reason of this is that, by virtue of what had transpired before the war and the contract of the parties that the debt should be paid to a certain agent, the debtor became entitled to pay and prevent the accumulation of interest upon it by making a payment of the debt to the agent, and the happening of the war would not revoke such power, because if it did it would deprive

the debtor of a vested right under the contract. Therefore it is that in such a case, if there is no agent in the sovereignty of the debtor to whom he can pay the debt, the accumulation of interest is stopped during the pendency of the war. But if there is an agent appointed prior to the war resident in the same jurisdiction with the debtor, he cannot get clear of paying the interest accruing during the war by alleging the existence of the war, because the conclusive answer to such a contention would be that there was an agent to whom he had the right to pay it during the war, and if he wished to escape the accumulation of interest it was his duty to make payment to the agent. This was decided in the case of Ward *v.* Smith, reported in 7 Wallace, 447. It is admited that it is not a question as to whether or not the appellants or their ancestors were damnified by the transaction of which they complain. The question is deeper and more profound than that, being this, Was the instrument, which it is alleged authorized the act complained of, a valid instrument?

IV.

The instrument executed by George Gibson Huntt was not a conveyance but a contract of sale, and passed no title.

Even if the power of attorney itself were valid, yet that could not avail the defendant, for George Gibson Huntt never exercised the power vested in him. The paper itself is plainly but a contract of sale. It is so recognized in the acknowledgment by the endorsement on the paper itself and by the intention of the parties. It is well settled that whether a paper containing the words "bargain and sell" is to be treated as a contract of sale or a deed of conveyance depends upon the intention of the parties.

Warvelle on Vendors, vol. 1, sec. 24, speaking of the

effect and operation of contracts of sale, uses this language:

"The ordinary effect of an agreement to convey imparts nothing more than an executory promise, and the operation of the instrument will not usually be extended beyond this; yet it will often happen that parties through ignorance of the legal effect of words, inadvertence, or mistake make use of language which, standing alone, indicates a present grant rather than a mere agreement for some future action.

"The employment of the words 'grant, bargain, and sell,' or 'do sell,' or 'by these presents do sell and convey,' or words of like character, all impart a present grant, and their use is by no means unfrequent in agreements for conveyance. But, notwithstanding the contract contains words of conveyance *in præsenti*, still, if from the whole instrument it is manifest *that further conveyances* were contemplated by the parties, it will be considered an agreement to convey and not a conveyance. In determining whether an instrument is an immediate conveyance or only an executory contract, the intention of the parties must be sought for in every part of the instrument. If it contain words of present assurance, these words afford a presumption that an executed conveyance was intended. But this presumption is not conclusive; it may be overcome by the presence of other words which contemplate a future conveyance. *Intention* is so imperative in the construction of grants that *the strongest words of conveyance*—the present tense—*have been* held inoperative to pass the estate *if other parts of the writing evince a contrary intention*, or tend to show that the agreement itself was not designed to pass title.

If the instrument *is called by the parties an agreement*, this is a circumstance of importance, for in popular understanding there is a distinction between an agreement and a deed, the former being regarded as preparatory to the latter, and generally, if by the terms of the contract any material act remains to be done, effect will be given to the instrument only as an agreement to sell."

The authorities abundantly support the text. Thus is Jackson *v.* Moncrief (5 Wend. 26) it is said :

"Although there be words of conveyance *in præsenti* in a contract of purchase and sale by lands, still, if from the whole instrument it is manifest that *further conveyances* were contemplated by the parties, it will be considered an *agreement to convey* and not a *conveyance*."

In Grey *v.* Packer, 4 Watts & Bergh (Pa.), 18, the doctrine is well stated by Sergeant, J. :

" In all the cases cited, where the instrument has been construed executory, although some of the words impart a present grant, yet there were other clauses by which *something further was to be done*, or which showed it to the design of the parties, from the tenor of the whole instrument, that it was to be merely executory."

In Ogden *v.* Brown (33 Pa., at p. 249), Story, J., delivering the opinion, says :

" There are words in this instrument which impart a present conveyance. We think there are others which indicate that it was not intended as a final disposition of the subject-matter ; and if it was not, then the contract must be regarded as executory. * * * Where there is a covenant for a future conveyance the intention is clear ; but the *intention* may be manifested without such covenant."

Where the question is doubtful the court will even go outside of the instrument and examine the circumstances attending the execution to determine the *intent.* Thus in Phillips *v.* Swank (120 Pa. 76) it was held :

" Whether an informal instrument transferring an interest in real estate shall be construed a conveyance or only an executed agreement depends, not upon any par-

ticular words or phases it may contain, but upon the intention of the parties derived from the instrument itself, and, *when that source is doubtful, supplemented by the circumstances attending the execution.*"

That the instrument executed by Huntt was a mere contract of sale can admit of no doubt when read in the light of these authorities. While it contains the words "have bargained and sold," the subsequent language plainly indicates that they were not to have the effect of a *deed of conveyance*, for he says, "and I hereby *further agree*, in behalf of said Robert and Mary Ransom, that they shall and will, as soon as convenient, make and execute a proper *deed of conveyance* of said premises to *Benj. Ogle Tayloe.*"

In Foster *v.* Foster (1 Levinz, 55), one of the principal reasons given by the court for deciding an instrument *executory* was that it was called by the parties "articles of agreement." In the paper now before us it is *acknowledged* not as a deed but as a "contract of sale," and the endorsement on the paper is, "George Gibson Huntt to Benj. Ogle Tayloe—contract of sale." Moreover, the correspondence offered in evidence by the defendant himself shows it was only intended as such. Judge Cox, the attorney, writes:

"He [Tayloe] thought it better, and he is perhaps right, to pay each one of you his or her share *on receiving the deed from each.* He has therefore paid me your share and given me an authority on Mr. Riggs to pay the rest *on receiving the deeds.* This will relieve you of any responsibility as to Minnie's [Mrs. Ransom's] share * * * and she can do what she pleases with it *when the war is over.*"

Thus indicating that Mrs. Ransom was to execute *her deed* at some future time—"when the war is over."

A modification of this understanding was subsequently had, for we find the attorney writing that Mr. Tayloe "has agreed to pay Minnie's share as soon as Gibson [Huntt] will execute a formal *contract of sale*, and then he incloses a deed for Gibson Huntt to execute for his share and a *contract of sale* for "Minnie's share." If it had been intended that Huntt should execute a deed for Mrs. Ransom's share, a *deed* would have been sent him instead of a contract of sale. We submit, therefore, there is no escape from the conclusion that the paper was a contract of sale and nothing more, and this the Court of Appeals conceded.

V.

Being a Contract of Sale and not a "Deed for the Conveyance of Land," Its Defects Were Not Cured by the Act of 1865.

Aside from the fact that the persons claiming the benefit of the act of 1865 must show that they or those under whom they claim were in the *actual* possession of the land at the time of the passage of the act (and it is conceded that there was no such possession in the case at bar), the act only operates upon "deeds for the conveyance of land," and that this instrument was not a deed but a contract of sale we have already seen. The object of the statute was to cure certain defects in *deeds* of record which had been intended by the parties to *pass the title*, and which by reason of some technical defect in the execution of the instrument failed of that purpose. But, as we have just seen, this paper never was intended to pass the title. That was to be done by *another* instrument, a "proper *deed of conveyance*," which Gibson Huntt, the contractor, undertook to get in the future, but never did get. There

is no power in the court or the legislature to make a contract for the parties by turning A's *contract of sale* into B's *deed of conveyance*. The statute, therefore, no more operates upon this paper to make it the deed of Mrs. Ransom than it operates upon a verbal promise. To claim the latter would not be more preposterous than to claim the former.

The Court of Appeals concedes this proposition but decides that the alleged receipt of the purchase-money by Mrs. Ransom created an equitable estoppel in her or her heirs to claim the land.

This brings us to the consideration of the question how far a married woman is estopped in such a case.

In the first place, however, let us say that the evidence of the receipt of the purchase-money is of the vaguest character. The only testimony upon this subject is that of Mrs. Gibson, who testifies (R. 36):

"Q. I will ask you to state whether or not you paid that money over to Mrs. Ranson or for her account in any way?

"A. It was *either* paid over to her or spent for her at her direction.

"Q. By whom?

"A. By myself, *as well as I can possibly remember*."

This is all, absolutely all; not a letter, not a receipt, not an account; but thirty-two years after the money was received by her, she is now able to say, "as far as she can possibly remember," that it was *either* paid over to her or spent for her at her direction.

One of the first elements of estoppel, even against persons *sui juris*, is that it must be shown that the party against whom the estoppel is to operate acted *with full knowledge*, yet not one scintilla of evidence is offered to

show that Mrs. Ransom *knew* where this money came from, even conceding that the evidence is sufficiently clear and positive that she received it at all. But the doctrine which prevails with the best authorities is that even with knowledge a married woman is not estopped.

"The next point is that of estoppel. If, through the administration of equity, we can produce a result which the law denies *ab initio* on grounds of public policy, the estoppel, or compensation, its equitable equivalent, will accomplish what the law and policy have forbidden. But we have seen that in such a case equity does not overturn but follows the law. (Story Eq. § 64 *a*. 3, 96, 97, 177, 243.) Our own cases fully establish that there is *no such doctrine of equity*. In the first place, the receipt of the consideration by a married woman is no ground for the interposition of equity. If it were, then in no case where a *femme covert* has received a *quid pro quo* would her legal incapacity protect her. It would be but technical and, like a penalty, would be relieved against. This would be a flat denial of a legislative policy, founded on the most important reasons, entering into the very constitution of society, and social order must lie at the feet of chancery."

Agnew, J., in Clidden *v.* Strupler, 52 Pa. 400.

"It is insisted, however, that Mrs. Foster should be estopped from denying that she signed and acknowledged the mortgage. The answer to this is that to permit an estoppel to operate against her would be a virtual repeal of the statute that extends to her this protection, and also a denial of the disability of the common law that forbids the conveyance of her real estate by procuration. It would introduce an entirely new system of conveyances of the real estate of *femmes covert*."

Dury *v.* Foster, 2 Wall. 34, Clifford, J.

"A married woman who makes a verbal agreement to release all her interest in certain real estate, and in con-

sideration thereof, receives a conveyance of other real estate, but suppresses no material facts, nor makes any false representations in regard to the matter, is not estopped from claiming her interest in the real estate which she agrees to release, and the contract cannot be enforced against, because she is not competent to make it.

"A married woman may preclude herself from denying the truth of her representations, but only in the case of pure torts. If her conduct is so connected with contract that the action sounds in contract, there can be no estoppel."

Oglesby Coal Co. *v.* Pasco, 79 Ill. 164.

"A bond for the conveyance of land signed by a married woman confers neither a legal nor an equitable title upon the obligees. And as to the receipt of the money mentioned in the testimony after they become sole, it certainly could not operate as a legal conveyance, passing the estate to the grantee, nor give effect to a deed which as to them was utterly void."

Agricultural Bank *v.* Rice, 4 How. 225, 242.

"A married woman is not estopped to set up her title to real estate for which she has made a void deed, notwithstanding she has received the purchase-money, unless she has been guilty of some fraudulent representation." See Oglesby Coal Co. *v.* Pasco, 79 Ill. 164, *supra*, and the following authorities:

Patterson *v.* Lawrence, 90 Ill. 174.
Drake *v.* Glover, 30 Ala. 382.
Connolly *v.* Braustler, 3 Bush. 702.
Bigelow Estoppel, 513 (3d ed.).
Carpenter *v.* Carpenter, 10 C. E. Green, 194.

The learned Chief Justice of the Court of Appeals has cited two authorities in support of the proposition that a married woman is estopped by the receipt of the purchase-money, viz: Bank *v.* Porter, 99 U. S. 329, and Bein *v.* Heath, 6 How. 247. An examination of those authorities

will show that they scarcely bear out that doctrine. *Fraudulent representations* were the basis of the facts of those cases and the opinion of the court proceeds upon that theory.

VIII.

Do the alleged power of attorney and the contract of sale vest in the defendant an equitable estate?

The learned court below proceeds to say, "Lastly, however, the instrument and the sale evidenced thereby have effect by operation of the settled principles of equity to vest in the purchaser an equitable interest or estate." It is respectfully submitted that this reasoning is a *petitio principii*, for it must necessarily proceed from the postulate that the instrument of sale referred to was one which the party whom it is sought to bind by it had the power to make, and that is the very question involved in this case. No results can flow from a *void* act to deprive one of any rights to which he was entitled. What we mean is this: that while it is true that an informal and inchoate contract made by persons who had the *right* under the law to make a binding and valid contract may in equity be construed as vesting an equitable interest in the other party to that contract, yet to contend that out of a *void* and unauthorized contract it is possible for equities to arise would be to abrogate the protecting power and influence which declares that parties not *sui juris* shall not be able to bind themselves, either in law or equity, by contracts which the law declares they shall not have the power to make. Therefore when Chief Justice Story or any other writer upon the law, or any court, declares that such instruments, though they be informal and inchoate, shall have certain equitable results, it can only

apply to instruments which the law authorized the parties to bind themselves by, for, whatever else may be said or however far the argument may go, after all it depends upon whether or not the conduct of the parties has been such as to estop them from denying the equitable rights which their inchoate and invalid instruments have conferred upon another party; and this incidentally involves the question of whether or not a married woman can be estopped by acts *in pais*. We have shown to the court that the decisions hold a married woman not to be estopped by receiving the purchase-money for property the legal title to which she could not convey to another; and it is submitted that the authorities, without one single discordant note, declare that married women cannot be estopped by any act which is not in itself intentional and fraudulent. Her silence, her assent, her standing by without objection—none of these things estop her; but in order to be estopped from claiming what the law declares is her legal right, either in a court of law or in equity, her conscience must become affected by having done some fraudulent act, by means of which others have been entrapped into dealing with her to their prejudice and loss. When the law declares that a married woman shall not be bound by her contract unless it be in a particular form and evidenced by particular ceremonies, no act of hers, short of fraudulent conduct, can estop her from claiming the protection of that law in whatever forum it is raised. It is further respectfully submitted that the law as to which of two innocent parties shall suffer must necessarily refer to transactions which the party is authorized to make, and cannot by any rule of construction, or the application of any rule or principle of law, be made to apply to the case of an act from the effect of which a married woman is claiming exemp-

tion, which act the law declares she had no power or authority to do, for so to judge would be to deprive her of that protection which the law in its mercy and in its discretion has thrown around her.

IX.

The Equities are with the Plaintiffs.

In 1864, when this property was sold, a war was raging between two sections of the country. It was not known when it would end. The price of real estate in Washington city never was lower, while the sale of it at that time could be of no possible benefit to Mrs. Ransom. She could not then receive the purchase-money, and it was not, as the testimony shows, intended that she should receive it "until the war was over." Undoubtedly, if only her interests, instead of the interests of the other heirs, who desired and probably needed the money, had been consulted, the sale would not have been made. However unintentional it may have been, her interests were sacrificed to raise money for others. When the power of attorney was executed, nearly two years before the war, it was, as Mrs. Gibson testifies, the purpose to sell *at once*. It was presumably never in the contemplation of Mr. and Mrs. Ransom that five or six years afterwards, under circumstances never dreamed of by any of the parties, a sale should be made of their interest, when they could not—possibly for years afterwards, and possibly never—derive any benefit from such sale. If the war had not revoked this power of attorney, certainly, from an equitable standpoint, the uncontemplated change in the relation and situation of the parties should have revoked it, just as marriage and birth of issue revokes a will, and death an agency. There is,

therefore, no obligation—legal, equitable, or moral—upon the heirs of Mrs. Ransom to give up their right to twenty thousand dollars' worth of real estate because at some time in the distant past her then co-tenants, for their benefit and not hers, attempted (it is to be hoped unsuccessfully) to sacrifice her interests for about two hundred dollars, which would be the proportion to the purchase price which the interest in this square bears to her whole interest in the property attempted to be sold. And who is it who disputes their title? Are they *bona fide* purchasers for value without notice? Not at all. They are mere volunteers, one of them tenant by the courtesy, and the others heirs of one who was herself a volunteer—one of the children of Benj. Ogle Tayloe. But it is said John W. Paine has erected valuable improvements; but he did so with notice of our title, and therefore at his peril. If he can show that he made them in good faith, he will be allowed for them; otherwise he ought not to be. As to the payment of the taxes, a tenant in common who is in the enjoyment of the entire property *ought* to pay the entire taxes.

X.

The bill should in no event have been dismissed absolutely, but should have been without prejudice.

Lastly, whatever may be the opinion of the court as to the matters we have discussed, it would seem that there can be no question that the court below erred in dismissing the bill absolutely. In its opinion it was conceded that in a court of law the rights of the parties would be differently adjudicated since we have the legal title, and, we submit, the plaintiffs should not be shut off by the decree from prosecuting what legal rights they may possess.

FRANKLIN H. MACKEY,
Solicitor for Appellants.

No. 114.

Kepley Byg. & Mackey Co.

Filed Nov. 9, 1897.

Supreme Court of the United States.

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FANNIE P. WILLIAMS ET AL., APPELLANTS,

vs.

JOHN W. PAINE ET AL., APPELLEES.

BRIEF FOR APPELLANTS IN REPLY TO BRIEF FOR APPELLEES.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 11-8-'97

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The counsel for appellants does not file this brief to re-argue the law pertaining to this case, but for the purpose only of correcting certain misstatements as to the state of the record which appear (without doubt unintentionally) in the brief for appellees, and also to correct certain misapprehensions of the learned authors of that brief as to cases and statutes cited by us in our brief. In doing this we shall take up their brief and, noting the pages upon which the subject-matter of comment is contained, briefly reply thereto.

Pages 6 and 7.

The statement on these pages as to three suits in ejectment having been brought by the appellants and afterwards *dismissed* has nothing in the record to support it. The pages referred to in support of this statement, to wit, pages 49, 18, do not show that such suits were ever even commenced. It is true, counsel there stated that he offered in evidence the *record* of certain suits, but he did not produce the said records and they *never were in the case*, as is shown by the certificate of the clerk of the Court of Appeals, in which it is stated that the record sent here is "a true copy of the transcript of the record and proceedings," &c. The certificate in effect states that appellants have brought up *everything* that was before the court below. The record of these ejectment suits is not in the record here, and therefore were not in the court below. It is manifestly unfair, then, to argue upon alleged facts *dehors* the record. It is true that Mr. Justice Hagner spoke in his opinion of these suits, but in doing so he spoke of a matter not in the record, as he did of other matters not in the record. If counsel had desired the record of these suits to become a part of this record he should have complied with the rules of court and filed certified copies of them. It was not our duty to ransack the files of the court for these papers nor to file certified copies of them merely because counsel said he "offers them in evidence." Suppose he had said he offered in evidence the record and proceedings in fifty suits as they appeared among the files of this Court, would it have been our duty to have hunted up these suits, procured certified copies, and put them among the records of this case? Certainly not. If it was the defendant's intention to show that any of these suits which he speaks of had ever been brought, it was his duty to have procured certified copies of the papers and filed them in the record, and then, and not until then, are they in evidence, and then, and not until then, is it the clerk's duty to copy them into

the transcript of the record. So that there is no proof in the record that these ejectment suits ever were brought. It is not of any very great consequence whether they were brought or not, but were any such matter in the record the appellants would be able to show an excellent reason for its existence. As an illustration, we might suppose the death of a life tenant who brought the suit, necessitating its dismissal and the bringing of a new suit in the name of the reversioners, or we might be able to show the inability to obtain service upon the defendant John W. Paine because he had constantly evaded service, not only out of court but in court, by obtaining the quashing of orders of publication against him on the ground that service by publication in ejectment was not allowed in the District of Columbia. (See Staffan *vs.* Zuest, XXV Wash. Law Reporter, 188.) But it is folly to argue upon facts not in the record, and, declining to follow the example of counsel for appellees, we shall not attempt it.

Page 7 contains the following:

(*a.*) "Nor is it denied that it was the intention and purpose of Mrs. Ransom and her husband to give to her brother full power and authority to dispose of her interest in this property.

(*b.*) "It is nowhere denied that he undertook to execute that power;

(*c.*) "That the consideration was actually paid by Benj. Ogle Tayloe, nor is it anywhere denied that the consideration was received by Mrs. Ransom."

In reply we say (*a*) that it is denied most emphatically that Mrs. Ransom and her husband ever gave, as matter of law, to her brother "full power and authority to dispose of her interest in this property." The alleged power of attorney gave no "power and authority" to her brother to dispose of the property, and, moreover, the instrument itself was not, as matter of fact, executed with the remotest inten-

tion that her brother should sell the property *at the time* he did, under the *circumstances* he did, nor for the *price* he did. The record shows (pp. 39, 40, testimony of Mrs. Ransom's sister) that this paper was executed in 1859, when General Ransom was a young lieutenant in the United States Army. He had been ordered West and was in need of money to take his family out with him. The paper was executed to enable his brother-in-law to make an *immediate* sale of the property, but for some reason no sale was made. Time passed on, the war came on, and Robert Ransom, from a poor lieutenant in the United States army, had become a major general in the Confederate army. All the circumstances of time, place, and condition had changed as much as they could possibly be changed, and the paper itself was probably forgotten, if not lost, until under stress of the affairs of Mrs. Gibson and her brother, who, finding they could not make title without this paper, suddenly thought of it, through their then attorney, Mr. Walter S. Cox, and used it for *their* benefit and not for the benefit of Mrs. Ransom, who, if she ever did receive any benefit from it, did not, upon their own showing, do so until several years afterward, by which time the war was ended. (*b*) It is also emphatically denied that he (Gibson Huntt) ever "undertook to execute the power." What Gibson Huntt undertook to do for Benj. Ogle Tayloe was to sign a paper agreeing to get the signatures of Mr. and Mrs. Ransom to a deed some time in the future. There was nothing in the paper authorizing him to do this; nor in fact did he ever "bargain and sell" the property to Benj. Ogle Tayloe. Judge Cox made the "bargain and sale," and then sent on to him a paper to sign, which under the alleged power of attorney he had no power to sign, even supposing the power of attorney otherwise valid. No power was given Judge Cox to sell Mrs. Ransom's property. He says he did it "at the immediate request of Mrs. Gibson" (Rec., p. 46). If the power of attorney was valid the only person who could sell Mrs. Ransom's property was

Gibson Huntt, *delegatus non potest delegare.* (c) Again, it is emphatically denied that there is any proof in the legal sense that Mrs. Ransom received the purchase-money, or that, if she did receive it, she received it knowing it to be such. Mrs. Gibson says (p. 36) she "either paid it over to her or spent it for her at her direction, *as far as she can possibly remember.*" This *one line* of testimony is relied on by the appellees as proof that Mrs. Ransom knowingly received the purchase-money, because they are compelled to take the position that she received it knowingly or else abandon their case. Mrs. Gibson, a lady whose veracity is not questioned in the slightest, shows her respect for the obligation of an oath and will not venture to say positively that Mrs. Ransom received this money. She will only venture upon what is equivalent to such expressions as "I think so" or "I believe so" or "As far as my memory serves me," "I am not positive, but as far as I can possibly remember I either paid it to her or spent it for her at her direction." Without the slightest intention to reflect upon the witness, we respectfully ask, as a test of what this witness proves, whether she could be convicted of perjury upon a charge that she had sworn Mrs. Ransom received the purchase-money, even if a thousand witnesses swore that she had not received it? Most assuredly not, for the excellent defense would be that she had not so sworn; nor in an action for money had and received could it be recovered upon the testimony of a witness who swore to no more than "I either paid it to him or spent it for his benefit, as far as I can possibly remember." It is respectfully submitted that to charge a married woman with estoppel on the ground that she had knowingly received the purchase-money the evidence must be more reliable than this. It is almost as bad as "*non mi recordo.*"

On the other hand, the contract of sale made by Gibson Huntt expressly declares that he (Huntt) would at some time in the future get from Mrs. Ransom a regular deed of conveyance, and the fact that no such deed was obtained,

notwithstanding its very great importance to the grantee, is pretty good evidence that they could not get it because Mrs. Ransom refused to give it. Why did she refuse to give it? They admit she was an honorable lady. Why did they not apply to the courts to compel her to specifically perform this contract during her life if they were so certain that she received the purchase-money, and that she was bound by it?

But it is submitted this case is not to be tried upon such considerations. If the appellants' counsel had conceived that the door was to be thrown open for the trial of this case upon the ethics of human conduct, good and sufficient reasons might have been given why this sale to Benj. Ogle Tayloe should be condemned as a transaction which the heirs of Mrs. Ransom are not under the slightest moral obligation to recognize. The vice of going outside of the *law and facts* of a case to moralize upon a situation when *all* the facts are not, and cannot, in the wisdom of the law, be before the court is sufficiently demonstrated by this attempt of appellees' counsel to stigmatize after his death a gentleman like General Ransom, who was well and publicly known during his lifetime as a man of the highest integrity; and their attempt also to cast upon Mrs. Ransom's children a reflection upon their honesty. Let counsel try this case *upon the law*, and let them not seek to break into chambers whose doors are locked and should continue to be locked. The purity of the motives of appellants is not before the court, but the question of their *rights under the law* is, and we are here to try that question and none other.

Page 9.

"It appears the object of the sale was the benefit of the Ransom family, and that the money was used for the benefit of the Ransom family."

As to the latter part of this statement we have to say that there is not a scintilla of proof to sustain it, unless it be from

the fact that it is *claimed* that Mrs. Ransom received the purchase-money, and *therefore* (?) her family got the benefit of it. As to the first part of the statement, viz., that "the object of the sale was the benefit of the Ransom family," there is also not a scintilla of proof to sustain it, while, on the other hand, we have pointed to the proof that it was not and could not under the circumstances have been for their benefit. Counsel for appellees refer to page 39 of the Record to sustain their statement. They have evidently only read the first few lines of that portion of the testimony as contained on the bottom of the page and failed to turn the page and read to the conclusion. An attentive reading of Mrs. Gibson's testimony upon this point, where she says "it was sold more especially for the benefit of General Ransom's family," will show that she meant nothing of the kind. Let us read it:

"Q. Did you have any communication with your sister with regard to this property during the war?

"A. I have no recollection of it at all. I know there never was any question about it.

"Q. I don't mean with regard to the seven hundred dollars. I mean in regard to the property.

"A. *I never spoke to her on the subject.* I do remember that the property was sold at the suggestion of General Ransom and for their benefit.

"Q. That was during the war?

"A. Before the end of the war; it was sold in good faith. It was sold more especially for the benefit of General Ransom's family. It was unimproved property and the taxes were eating it up.

"Q. It was, then, just because your family supposed at that time that General Ransom and his wife, Mrs. M. Ransom, were in need of this money that the property was sold?

"A. Well, yes. I think his expenses were very high and he wanted money.

"Q. At that time he was an officer in the Confederate army?

"A. *I am talking of the time the power of attorney was given.*"

So that this lady, in her confusion from being upon the witness stand, uses language at first which it is plain did not convey her meaning. She meant the power of attorney was given because at that time (1859) General Ransom was needing money, and he was requesting that the property be sold. The learned counsel will hardly seriously contend that General Ransom, a major general in the Confederate army, communicated by some underground railway with his relations at the North and requested them not only to make a sale of this property, but desired that they should render themselves liable to arrest and imprisonment by remitting the proceeds to him through the enemy's lines.

In more than a half dozen places in their brief appellees' counsel refer to this particular piece of testimony to sustain their assertion that the property was sold for General Ransom's benefit. We ask, therefore, that whenever the Court shall meet with that assertion it will bear in mind this criticism of it.

Page 10.

"As far back as 1864 Benj. Ogle Tayloe got a tax deed for the property because of the default in the payment of taxes.

"It is not necessary to claim that this deed vested the legal title in Tayloe. It was not offered for that purpose; but it was evidence of a claim and color of title in Tayloe as far back as 1864."

The criticism of this statement is, *first*, that as Benj. Ogle Tayloe was our cotenant, his purchase of the property at a tax sale inured as much to our benefit as to his. A tenant in common cannot buy at a tax sale and hold under the deed adversely to his cotenants; and, *secondly*, even if he could, it is not attempted to show that there was an adverse occupancy of the property for such a length of time as to ripen into a legal title. Indeed, Mr. Paine's own testimony shows that it was only a few years before the bring-

ing of this suit that the property was occupied by any one. It is agreed all round that up to that time it was a *vacant* piece of ground. Moreover, if the appellees claim under the tax deed they are estopped to deny that we are tenants in common with them.

Page 12.

"The statement in complainants' brief (p. 23) that the court of appeals of Maryland (Campbell *vs.* Lowe, 9 Md., 500, 511) held the contrary, and that showing title by one out of possession would sustain a bill for partition is incorrect.

"By reference to the facts in that case it appears that the complainant Campbell claimed an undivided moiety of the land by virtue of a sheriff's deed, and instead of being *out of possession* the report shows he was *in possession*, having been 'PUT IN POSSESSION UNDER A WRIT OF *habere facias*.'"
Campbell *vs.* Lowe, 9 Md., 501.

The learned counsel for the appellees are unfortunate in their examination of the case of Campbell *vs.* Lowe. It is true that the complainant in that case stated in his bill of complaint that he had bought the interest of one of the two tenants in common under a *fi. fa.* issued thereon, and that the sheriff's deed had been "duly executed and the complainant put in possession under a writ of *habere facias*," but we all know how the purchaser of an undivided interest is "put in possession." The sheriff merely returns on his writ that he has done so, and then the party is supposed to be *constructively* in possession of his undivided interest. That it was so done in the case cited is plain from the answer of the cotenant, "That complainant has *never been in possession* of any part of the property, *and the sheriff never delivered* ACTUAL *possession of any part to him*," and that answer, being directly responsive to the bill, was necessarily taken as true by the court unless it was overcome by the testimony of two witnesses, and as

the case appears from the report it was not attempted to be contradicted; so that, notwithstanding the attempt to correct us, we still insist that we were not "incorrect" in our statement of the case of Campbell *vs.* Lowe.

Page 13.

"And Professor Washburn, speaking of the rule laid down in some States that a married woman, even jointly with her husband, cannot execute a valid power of attorney to make a deed of her interest in real estate, says:

"'But it is difficult to perceive any reason for the rule where she can do the principal thing herself; and such a right is clearly recognized by *statute* in Massachusetts; and a similar right is also recognized by *statute* in New York.'"

3 Washburn, Real Prop., 232, 233.

Certainly where the married woman can do "the principal thing herself," viz., convey her estate as a *feme sole*, she can likewise convey by power of attorney. We have asserted this more than once in our brief. Nor have we ever denied that by *statute* a married woman may convey her common-law property, and this citation only supports our proposition that *except by statute* such a conveyance cannot be made.

Page 15.

Counsel for appellees are equally unfortunate in their statement (p. 15) that—

"Powers of attorney by *baron* and *feme* to convey the lands of the wife were not unknown or unused in the early days of the colonies. * * * Such a power of attorney appears not only to have been recognized by the court, but judgment given in favor of the validity of the deed made thereunder so far back as 1738." (Elliott's Lessee *vs.* Osborn, 1 How. & McH., 146.)

A reference to the head-note of that case (which exactly states the case) will show how much the learned counsel have misstated that decision. The head-note is:

"An *acknowledgment* of the deed of a *feme covert*, made by an *attorney* in open court, in pursuance of a power *annexed to the deed*, is valid."

The "attorney" and the court in that case, unlike counsel for appellees, knew very well that the acknowledgment, though made in 1695, was, under the act of Maryland of 1671, referred to in the preamble of the act of 1715, and of which the said act of 1715 was but a re-enactment with some additional provisions. If the learned counsel had examined that case a little closer, or, perhaps, a good deal closer, than they have apparently done, they would have seen that the conclusion to which they at first so hastily jumped was entirely erroneous.

Page 20.

"The complainants' counsel contends (Brief, p. 31) that the act of March 3, 1865, could not have the effect of giving validity to this power of attorney, because it applies only to the acts of attorneys that a married woman could legally appoint as to some separate estate which she had a power to deal with as a *feme sole*, and as to which she could appoint an attorney.

"As to this proposition, it is to be noticed that complainants' counsel do not explain why a statute should be passed validating powers of attorney which are already valid, and it is submitted that this act was designed not to declare good that which was clearly valid, but to declare to be effectual certain *attempted and intended* conveyances which were either invalid or doubtful in law."

Complainants' counsel is not required to explain a proposition which he never made. A married woman with power to convey her estate as a *feme sole*, and consequently having power to convey by attorney, might very well find the con-

veyance by attorney *defectively* executed. The purpose of this statute was to cure the defect and make that valid which until then was invalid; but the reply to the argument of appellees' counsel will be found in the reading of the act itself. Among its purposes was to declare that deeds which had been acknowledged by powers of attorney (see provisions of the Maryland act of 1715), but *defectively* acknowledged by the attorney, should nevertheless be valid by virtue of the curative powers of this act of Congress. That act recognized the fact that married women, being "out of the province" and having equitable separate estates which they could convey as *femes sole*, might have found it necessary to send on their executed deeds to be acknowledged "in the provincial or county court where such lands or tenements lie," the deed being accompanied with the power of attorney to acknowledge it, as provided by the statute of 1715. Now if, as often happened, such a power of attorney was defectively executed, it was cured by the act of Congress of 1865 and made "effectual and sufficient," if the power of attorney "had such acknowledgment of the same as would be sufficient *under the provisions of this act* (act of 1865) to pass her estate and interest therein were she a party executing the deed of conveyance." That was the plain purpose of the act—that is to say, stating it in other words, the act validated deeds of conveyance made by married women having estates which they had the power to convey as if they were *sole*, and therefore power to have the same acknowledged by an attorney-in-fact under the provisions of the act of 1715. Having this power and attempting to execute it, the act of 1865 contemplated that the attorney-in-fact might possibly have defectively acknowledged the deed, and hence the act was intended, among other things, to cure these defective acknowledgments as well in the case of married women having equitable estates as *femes sole* as in the case of other persons. It plainly never was its purpose to give any new power to a married woman, and especially not

to empower her to convey her common-law property in any other way than by joining with her husband under the requirements of a privy examination.

Page 24.

"The appellants also contend that the act does not apply, because the defendants were not in possession on March 3, 1865. This is wholly unsupported by the facts in the record. It is conceded that Tayloe, as tenant in common, had title in fee, and there was no one in adverse occupation. The tax title was acquired in 1864, and the deed from George Gibson Huntt in January, 1865. Clearly, where there was no adverse occupation, this is ample evidence of possession by Tayloe at the date of the act."

That is to say, although the statute expressly declares "in favor of persons in *actual* possession," nevertheless a *constructive* possession is sufficient! When a tenant in fee-simple has not the actual possession, and no one else is in actual possession, inasmuch as there must be a possession somewhere, the law gives the party having the title what it calls a "constructive" possession. If the statute had said "in favor of persons in possession," the argument of appellees' counsel might well apply; but it has not said so; it has limited the possession to an *actual* one.

As to the proposition contained in the next paragraph of appellees' brief, viz., that the actual possession intended is that at the time of trial, when the deed is relied on as a defense, we need only call attention to the title of the act itself in addition to what we have already said upon the subject. The title of the act is (p. 45 of appellees' brief) "An act to quiet titles in favor of parties in actual possession of land in the District of Columbia," meaning, undoubtedly, those *then* in actual possession, and not those who might thereafter get into possession. If appellees' construction be the true one, then the act of 1865 placed it in the power of a wrong-doer to eject a party who was in actual possession at the time of the passage of the act

under a defective deed cured by the act, and then when he, the ejector, was sued in ejectment by the ejected party, have it in his power to reply that the defective deeds were not to be considered as cured when offered in evidence by the party ejected and out of possession at the time of trial, for, to use the language of appellees' counsel, "It was not the purpose of the act to *disquiet* titles by permitting persons out of possession to recover by them," viz., the deeds which the act undertook to cure. Let us bear in mind this is the argument of appellees, viz., that, conceding we have no title, yet if appellants were in possession and appellees out of possession, the latter could not at the trial insist that the deeds they now claim under were cured by the statute, because that statute is only intended to protect those who are *in possession* at the time of trial. Hence, on their own showing, once let us put them out of possession and their deeds are of no benefit to them, for the act, they tell us, is only intended to benefit those in possession at the time of trial, or, which is the same thing, at the time of bringing the action. Surely the appellees' counsel are hoisting themselves by their own petard.

Page 25 et seq.

In so much of appellees' brief as is devoted to the discussion of the question whether the power of attorney was revoked by the war, we wish to say that much of their industry has been wasted, if in their successful attempt to show that an agency to collect debts was not revoked by the war they have intended to combat anything said by us, for we have expressly said more than once in our brief (see especially p. 40) that such agencies are held not to be revoked.

Page 40.

The authorities cited on this page by appellees to show that a married woman is estopped by the receipt of the purchase-money are none of them in conflict with our proposi-

tion. We have repeatedly said, almost in the language of the authorities cited, that while the law protects a married women "it gives her no license to commit a fraud" (Bein *vs.* Heath, 6 How., 247)—that is to say, if she by any fraudulent acts or representations has induced one to pay her money for her property, she will not be allowed "to retain the benefits of the transaction which she has solicited and at the same time to disavow it" (Book *vs.* Porter, 99 U. S., 329). No one will for a moment seriously contend that Mrs. Ransom solicited Tayloe to buy from her or to pay her any money. He never saw her and never paid *her* a cent, nor did she know for years afterwards, if she ever knew, that he claimed she had sold him her property. (See Bank *vs.* Rice, 4 How., 242; Oglesby Coal Co. *vs.* Pasco, 79 Ill., 164.)

We have not deemed it necessary to reply to every statement of our learned friends where they have differed with us; we are content to let our brief speak for itself; but we have deemed it our duty, even at the peril of wearying the court, to point out the inaccuracies we have alluded to. With a full appreciation of the importance of the questions of real-estate law raised by the case at bar and an honest conviction that we are right in our contention, the case is respectfully submitted for the consideration of the Court.

FRANKLIN H. MACKEY,
Solicitor for Appellants.

No. 214

Brief of Calderon Carlisle & Johnson for Appellees

Filed Nov 5, 1897

IN THE

Supreme Court of the United States

OCTOBER TERM, 1897.

No. 214.

FANNIE P. WILLIAMS ET AL., APPELLANTS,

vs.

JOHN W. PAINE ET AL., APPELLEES.

On Appeal from the Court of Appeals of the District of Columbia.

BRIEF FOR APPELLEES.

CALDERON CARLISLE,
WM. G. JOHNSON,
Counsel for Appellees.

LAW REPORTER PRINT, WASHINGTON, D. C.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 114.

FANNIE P. WILLIAMS ET AL., APPELLANTS,

vs.

JOHN W PAINE ET AL., APPELLEES.

BRIEF FOR APPELLEES.

This cause comes up on appeal from the Court of Appeals of the District of Columbia from a decree dismissing appellants' bill (Rec., pp. 54, 87).

The bill (Rec., pp. 1, 16), though designated a bill for partition is in reality an attempt by parties out of possession to recover an undivided interest in a square of ground in the city of Washington which was long since sold by their ancestor who received and used, presumably for the benefit of these very complainants, the price of the property in question (Rec., pp. 36, 44).

Though the grounds on which the complainants base this alleged right are purely legal and technical, they have abandoned three ejectment suits against one of these defendants (Rec., pp. 28, 49), and have come into equity without any shadow of equitable right or title in their own favor, and without any suggestion of anything inequitable in the conduct of the defendants or those under whom they claim.

STATEMENT.

It is difficult to state the facts of the case more concisely or in a more interesting manner than that in which they are set forth by Mr. Chief Justice Alvey, speaking for the Court of Appeals, and his statement is therefore adopted with the addition of references to the pages of the record in this court to meet its rules.

> "The bill in this case was filed on the 10th of February, 1893, by the appellants against the appellees (Rec., p. 1). The bill, as amended, is framed with several aspects, and seeks to obtain relief in respect to several matters, and in various forms (Rec., p. 16). The plaintiffs allege themselves to be entitled in fee, as heirs at law of Mrs. Mary Ransom, deceased, to one undivided sixth part of square No. 53, located in the city of Washington, District of Columbia, as tenants in common with the defendants, who own the other five-sixths of said square (Rec., pp. 2, 16, 17). Mrs. Ransom, under whom the plaintiffs claim, was the wife of General Robert Ransom, and died intestate, in North Carolina, February 7, 1881, her husband surviving her, but who has since died, and before the filing the bill in this case (Rec., pp. 13, 17, 20).
>
> "It appears from the allegations of the bill and the proof, that Mary Huntt, one of the three children left by Dr. Henry Huntt, who had died intestate (Rep., p. 16), intermarried with Robert Ransom, Jr. (Rec., pp. 20, 35); and the three children, namely, Mary Huntt, afterwards Mary Ransom, Fannie Huntt, who intermarried with George Gibson, and George Gibson Huntt, inherited as heirs at law of their father Dr. Henry Huntt, the one moiety or half of said square No. 53, and of certain other parcels of ground in the city of Washington—the same having been previously acquired and held in equal moieties or halves, as tenants in common, by the said Dr. Henry Huntt and the late Benjamin Ogle Tayloe (Rec., pp. 16, 18): That being so seized and possessed, after their marriage, Mary Ransom and her husband, Robert Ransom, then an officer in the Army of the

United States, and stationed at Carlisle, in the State of Pennsylvania (Rec., p. 35), by their joint power of attorney, executed and acknowledged on the 23d of May, 1859, to George Gibson Huntt, the co-owner and brother of Mrs. Ransom (Rec., pp. 17, 43), authorized and empowered the said George Gibson Huntt to control, manage, bargain and sell, and in that event to convey, etc., all their rights, title, and interest in said property (Rec., p. 21). George Gibson Huntt was also an officer in the Army (Rec., pp. 20, 35). About two years from the date of the power of attorney, the Civil War broke out between the States, and Robert Ransom resigned his commission in the Army of the United States, and accepted a commission in the Confederate States Army, and afterwards attained the high rank of Major General in that Army (Rec., p. 14); and during the war his wife, the mother of the plaintiffs, remained in the South, within the Confederate lines (Rec., p. 39). In the summer of 1864, and during the continuance of the war, Walter S. Cox, Esq., then a practicing attorney here in the city of Washington, a relative of the heirs of Dr. Huntt, and now one of the Associate Justices of the Supreme Court of the District of Columbia, was solicited, especially by Mrs. Gibson to effect a sale of the interest of the Huntt heirs in the property mentioned and referred to in the power of attorney, including square No. 53, held as tenants in common as before stated (Rec., pp. 43, 44, 45). Accordingly, Mr. Cox, through a real estate broker, did effect a sale of all the interest of all the parties claiming as heirs of Dr. Huntt, in the property so held as tenants in common, and which sale was made to Benjamin Ogle Tayloe, the co-tenant, at and for the sum of $2,500 (Rec., pp. 44, 46). Thereupon Mr. Cox rendered a statement to Mrs. Gibson, one of the parties in interest and a sister of Mrs. Ransom, as follows:

"Amount of purchase	$2,500.00
"Payment of taxes by Mr. Tayloe, amounting to	199.27
"Leaving balance of	$2,300.73

(Rec., p. 51), to be divided into three parts, making the dividend to each of the three heirs the sum of $766.91 (Rec., p. 51). The whole amount of the purchase money, less the taxes deducted, was paid by Mr. Tayloe to Mr. Cox, and the latter paid over the same to Mrs. Gibson; and the share of Mrs. Ransom was paid over to her, Mrs. Ransom, by her sister, Mrs. Gibson (Rec., pp. 46, 47). And on the 29th of November, 1864, George Gibson Huntt, by virtue of the power of attorney from Ransom and wife, before referred to, reciting the sale and payment of the purchase money made and executed the deed to Tayloe, set forth in the record (Rec., p. 23). Both the power of attorney and this deed to Tayloe were admitted to record together on the 14th of January, 1865, (Rec., pp. 21, 23).

"It also appears, both from allegations and proof, that Benjamin Ogle Tayloe died testate in 1868, leaving several children, among them a daughter, Julia Dickinson Tayloe, who had previously married John W. Paine, one of the defendants (Rec., pp. 24, 25); and that the testator by his will, and codicil thereto, devised his real estate, including square No. 53, to his three daughters in fee simple, as tenants in common (Rec., p. 68). That afterwards, by deeds of partition, dated November 7, 1870, the real estate so devised in common was divided, and the devisees took their respective shares in severalty, and in this partition square No. 53 was allotted and conveyed to Mrs. Paine (Rec., p. 69). Mrs. Paine died intestate in February, 1872, leaving surviving her her husband, John W. Paine, and as her only heirs at law three infant children, defendants in this case (Rec., p. 24). The property was vacant and wholly unimproved (Rec., p. 29); and some time before the purchase of the interest of the Huntt heirs, as above stated, their interest in the property had been sold for taxes due the corporation of the city of Washington, and Tayloe had become the purchaser and taken a deed therefor (Rec., p. 68); and from that time forward he continued to pay all taxes and public dues thereon; and from the time of the partition of the real estate among the three daughters of the testator, John W.

Paine, one of the defendants, continued to pay the taxes thereon, and to exercise exclusive ownership over the same, in right of his wife, and for himself and his children (Rec., pp. 25, 26); and subsequently, at a cost of about $125,000, he erected twenty-two stone and brick dwelling houses on the square, from which he has been in receipt of the rents (Rec., p. 27).

"The bill, alleging the facts to which we have referred, and others less material, prays for the following relief (Rec., pp. 3, 18).

"1st. That the deed or instrument purporting to be made by George Gibson Huntt, by virtue of the power of attorney made to him by Ransom and wife, be declared null and void, as a cloud upon the title of the plaintiffs:

"2d. That the right of the plaintiffs to a one-sixth part or interest in fee as tenants in common in said square No. 53 be established against all the said defendants by decree, as well the tenant for life, as the reversioners, heirs at law of Mrs. Paine, deceased:

"3d. That plaintiffs may have the said one-sixth part of square No. 53 set off to them in one undivided interest, if that be found practicable, and if not, that a sale of said square may be had under the direction of the court, and a distribution of the proceeds according to the interests of the parties entitled:

"4th. That John W. Paine, the surviving husband of Mrs. Paine, and one of the defendants, be required, under the direction of the court, to account to the plaintiffs for the rents and profits received by him from the said one-sixth part of said square No. 53, and that accounts thereof be taken; and,

"5th. That the plaintiffs may have all such further and other relief as the nature of the case may require.

"All grounds of relief as set forth in the bill are controverted by the answer of John W. Paine, the tenant for life (Rec., p. 6); and the other defendants, by their answer, say that they are not in possession of said square, and have never been in possession of it; and that the property in controversy descended to them upon the death of their mother, subject to

> an estate for life by the courtesy vested in their father (Rec., p. 11); and that they have no manner of interest or concern with the account of rents and profits prayed against the life tenant, and they therefore object to the bill as being multifarious (Rec., p. 11). With respect to most of the facts alleged, they say they have no personal knowledge, and they therefore demand proof thereof."

There were some other matters of fact alluded to in the body of the opinion of the Court of Appeals which are sufficiently covered by what follows in the statement of this brief.

The matter of the ejectment suits instituted and abandoned by appellants, is, however, not mentioned by the Court of Appeals, though Mr. Justice Hagner in his opinion says (Rec., p. 66):

> "The plaintiffs previously seemed to recognize the necessity of bringing suit at law for the relief they now seek, and accordingly instituted the three ejectment suits given in evidence, in which they expressly aver the possession of the defendant John W. Paine and their own ejectment by him."

The history of these suits is as follows:

On the fourteenth day of August, 1889, Robert Ransom, Jr., the father of the complainants herein, filed his suit in ejectment, No. 29,908 of the dockets of the Supreme Court of the District of Columbia, against all the defendants herein, seeking thereby to recover an undivided one-sixth of square fifty-three from the said defendants, in which he, the plaintiff, claimed a life estate as tenant by the courtesy in right of his wife, Mary Ransom, born Huntt. This action was, on the twentieth day of April, 1891, discontinued by the plaintiffs' attorney (Rec., p. 49, 18).

On the same day these complainants filed their suit in ejectment in the Supreme Court of the District of Columbia against the defendant John W. Paine, the same being

No. 31,641 of the dockets of said court, in which they sought to recover the possession of an undivided one-sixth of said square, to which they claimed to be entitled in fee as tenants in common, but on the sixteenth day of April, 1892, this action was discontinued by the plaintiffs' attorney (Rec., p. 49, 28).

On the same day the complainants instituted another action of ejectment against the defendant John W. Paine, the same being numbered 32,845 of the dockets of the said Supreme Court of the District of Columbia, whereby they sought to recover an undivided one-sixth of said square, to which they claimed to be entitled in fee as tenants in common (Rec., 49, 28).

On the tenth day of February, 1893, while the ejectment suit was still pending, this bill was filed, and the next day, the eleventh, this last action of ejectment was discontinued by the plaintiffs' attorney (Rec., pp. 1, 10).

It is to be observed that it is nowhere claimed by the complainants that there was any fraud in the procuring of the power of attorney, nor is it denied that it was the intention and purpose of Mrs. Ransom and her husband to give to her brother full power and authority to dispose of her interest in this property. It is nowhere denied that he undertook to execute that power; that the consideration was actually paid by Benjamin Ogle Tayloe, nor is it anywhere denied that the consideration was received by Mrs. Ransom. Though there is no charge of fraud, nor denial of the facts above stated in the complainants' bill, and no evidence was offered by the complainants on the subject, the defendants, notwithstanding the lapse of more than thirty years since the transaction was consummated, have, by extraordinary diligence, shown by uncontradicted testimony of the highest credibility that the power of attorney was executed freely by Mrs. Ransom; that it was her intention and pur-

pose to enable her brother to dispose of the property; that it was her desire and that of her husband to have it disposed of (Rec., p. 39); that all parties connected with the transaction acted in perfect good faith; that the money was paid by Tayloe to Judge Cox, and was the full value of the property at the time of the sale, and that the money so paid by Tayloe was actually received by Mrs. Ransom (Rec., pp. 36, 37, 46, 74).

Under these circumstances it cannot be pretended that the complainants have the shadow of a moral right to set up a claim to this property. No such claim was ever made by their mother in her lifetime, nor by their father in their mother's lifetime, nor by any one until more than eight years after Mrs. Ransom's death, and more than thirty years after the date of the power of attorney, and after the property had been handsomely and expensively improved.

It is also shown in the testimony that Mrs. Gibson, Mrs. Ransom's sister, and Colonel George Gibson Huntt, her brother, to whom the power of attorney was given, at the same time and in the same transaction, sold to Tayloe their interest in the property and for the same price, the total sum being twenty-five hundred dollars, one-third of which was the share of each (Rec., pp. 45, 46).

The sole ground of complainants' demand is that the power of attorney was not such an instrument as was technically sufficient in law to pass the interest of Mrs. Ransom to Benjamin Ogle Tayloe, and their position in this court is that, notwithstanding the fact that their mother and father authorized her brother to sell her interest, and accepted the purchase price from the purchaser of the property, yet because she did not, as in equity and good conscience she was bound to do, give to the purchaser a technically valid conveyance of the property, these complainants, standing in her place, have the right, not only to refuse to do what their mother ought to have done if the power of attorney was ineffectual, but have the right now to repudiate her moral

and equitable responsibilities in the premises, and to claim back the property for which their mother received the purchase price, and of which they are presumed to have had the benefit, as it appears that the object of the sale was the benefit of the Ransom family (9 Rec., p. 39); and that the money was used for the benefit of that family while these complainants were yet dependent children.

The defendants were all resident without the District of Columbia, and jurisdiction was sought to be acquired over them by publication in lieu of personal service of process. A special appearance was entered and motion made to quash the order of publication, which was overruled (Rec., p. 70). Thereafter the defendants, not waiving their objection to the jurisdiction of the court, but still insisting upon it, demurred to the bill (Rec., p. 4), and upon the demurrer being overruled (Rec., p. 5), still denying the jurisdiction of the court, and still insisting upon that objection and the objections raised by the demurrer, under compulsion, answered the bill (Rec., p. 6). The cause then came on for hearing on the merits, on the pleadings and evidence, and a decree was entered dismissing the bill (Rec., p. 54), from which complainants appealed to the Court of Appeals of the District of Columbia (Rec., p. 54). That court affirmed the decree of the court below and the complainants have appealed to this court (Rec., p. 89).

ARGUMENT.

I.

As to the Jurisdiction in Equity of the Cause by Reason of the Subject-Matter.

It is claimed by appellants' counsel that the order of the court overruling defendants' demurrer (Rec., pp. 4, 5), founded

upon the objection that the complainants were out of possession, and therefore could not maintain a bill to remove cloud from title or for partition, settled the law of this case, and that that question was not open to the consideration of the court on the final hearing. In this the complainants' counsel ignore the very important fact that under the demurrer the fact that complainants were out of possession was only to be inferred from the averments of the bill, whereas, when the cause came on for hearing on the merits that fact was affirmatively set up in the answer and unequivocally established by the evidence.

On the demurrer the question was, what did the bill show. On the final hearing the court had all the pleadings and the evidence, and the question was, what is the fact as to possession. Moreover, when a court is called upon to make a final decree or enter final judgment, it must render it according to the right of the matter, and is not bound to enter an erroneous judgment merely because at some prior stage of the proceedings a view has been taken and expressed as to the sufficiency of some pleading. The fact is that complainants were out of possession, and were kept out of it by defendants, holding adversely to them.

As far back as 1864 Benjamin Ogle Tayloe got a tax deed for the property because of the default in payment of taxes (Rec., p. 68).

It is not necessary to claim that this deed vested the legal title in Tayloe. It was not offered for that purpose. But it was evidence of a claim and color of title in Tayloe as far back as 1864.

The defendant, John W. Paine, as above shown, exercised exclusive ownership over said property in right of his wife, after Tayloe's death, by paying taxes, renting the property, and improving it by substantial and valuable dwellings (Rec., p. 25). Moreover, complainants brought ejectment suits to recover possession of the property against the defendant in possession, alleging their ouster by him (Rec., pp. 28, 49).

It is suggested by appellants in their brief that these proceedings in ejectment brought against defendants are not before this court because defendants failed to file copies thereof (Appellants' Brief, p. 7).

These records were in the pleadings regularly prayed to be taken and read as part of the answer, were regularly offered in evidence, and, in accordance with the uniform practice in the Supreme Court of the District, were read at the hearing by the originals, and the opinion of Mr. Justice Hagner shows that they were "given in evidence" and considered by the court (Rec., pp. 10, 49, 66).

But if it is intended by appellants' counsel to claim that the records of these suits did not disclose what is contended, or that the court gave any undue importance to them, it would seem to be the duty of appellants who bring up the record, to copy them into the transcript.

This state of facts seems to counsel to be a sufficient vindication of the position taken by the court that the bill was not maintainable, on the ground of complainants being out of possession, but as the learned chancellor found it to be his duty to dismiss the bill upon its merits, and was sustained by the Court of Appeals, counsel do not deem it necessary to present any extended views upon that subject, but respectfully refer this court to the very clear, accurate and complete exposition of this question embraced in the opinions of Mr. Justice Hagner, and Mr. Chief Justice Alvey, found in the Record (Rec., pp. 65, 66, 76).

In view of the fact that the decisions of the courts of the different jurisdictions are not harmonious, counsel would add this single suggestion to the views expressed in the learned opinions just mentioned, namely, that this is a question of local practice and procedure, and the decisions in the District of Columbia have uniformly been against the contentions of the complainants.

The statement in complainants' brief (p. 23) that the Court of Appeals of Maryland (Campbell *vs.* Lowe, 9 Md.

500, 511) held the contrary, and that showing title by one out of possession would sustain a bill for partition, is incorrect.

By reference to the facts in that case it appears that the complainant Campbell claimed an undivided moiety of the land by virtue of a sheriff's deed, and instead of being *out of possession*, the report shows he was *in possession*, having been "PUT IN POSSESSION UNDER A WRIT OF *habere facias*."

Campbell *vs.* Lowe, 9 Md. 501.

II.

The Power of Attorney and Execution Thereof by George Gibson Huntt are Valid and Passed the Legal Estate of Complainants' Mother.

Whether, at common law, a *feme covert* could give a valid power of attorney to convey her lands, is not a question presented by this record. A married woman, at common law could not herself convey, and could not do, by attorney, what she was incapable of doing as principal.

Before the invention of fines and recoveries she could not convey even with the assent of her husband; but after that she could, with his concurrence, and by a private acknowledgment designed to free her from his coercion. Later, fines and recoveries came to be unnecessary, and baron and *feme* could alien by deed instead of by record, but the husband must join and the wife privily acknowledge.

The husband and wife being capacitated to alien by deed, without the judicial proceedings of a fine or recovery, the question arises, can they, having the joint power to act, jointly empower an attorney to act for them?

Mr. Justice Story, in his work on Agency, expresses his opinion as follows:

> "Where a married woman is capable of doing an act, or of transferring property or rights with the

> assent of her husband, there, perhaps she may, with the assent of her husband, appoint an agent or attorney to do the same thing."
>
> Story on Agency, Sec. 6.

And Professor Washburn, speaking of the rule laid down in some States that a married woman, even jointly with her husband, cannot execute a valid power of attorney to make a deed of her interest in real estate, says:

> "But it is difficult to perceive any reason for the rule where she can do the principal thing herself; and such a right is clearly recognized by statute in Massachusetts; and a similar right is also recognized by statute in New York."
>
> 3 Washburn, Real Prop. 232, 233.

This view of the law was entertained by the Court of King's Bench as early as the fifth year of the reign of Charles the First, the question being whether a power of attorney of husband and wife to deliver a lease of the wife's land was valid, and Croke reports the case as follows:

> "*Ejectione firmæ.* The plaintiff declares upon a lease made by Sir Archibald Douglass and Dame Elionor his wife of an house and lands in Englefield. Upon not guilty pleaded, it appeared upon the evidence that the lease was sealed and subscribed by them both, and a *letter of attorney made by them to deliver it upon the land*; and it was thereupon strongly urged by Fynch, serjeant, and Sheldon, the King's solicitor, that a letter of attorney by *feme covert* is merely void, and the lease is only the lease of the husband; so the plaintiff hath failed. But *all the court* conceived it was a *good letter of attorney for both* and the lease well delivered, and it is the lease of them both during the husband's life."
>
> ——— *vs.* Hopkins, Croke, Charles, 165.

In Holladay *vs.* Daily, 19 Wall. 606, relied upon by complainants' counsel, the court, through Mr. Justice Field,

speaking of the general objection to a conveyance through a power of attorney by a *feme covert*, places it upon the requirement of a private acknowledgment by the wife, which must be made by her and cannot be made for her, and says (p. 609):

> "The private examination is required to protect her from the coercion or undue influence of her husband, and her acknowledgment is therefore considered as an essential preliminary to the validity of any transfer by her. The private examination is in its nature personal; it is a matter in which she cannot be represented by another."

In that case there was no acknowledgment at all to the power, while in the case at bar the acknowledgment is in every way as full. formal and sufficient as would be required for her deed.

The court further makes use of this significant language (p. 610):

> "Assuming, however, that such a statute [one authorizing a *feme covert* to convey by attorney in Colorado] does exist, or that without any such statute the authority of a married woman to convey in connection with her husband, which is conferred, implies a power to appoint an attorney for that purpose—and there are adjudged cases which proceed upon that theory—we do not see any objection to the validity of the deed executed in the name of Holladay alone, or to its operation in passing title."

So that it will be seen that this decision rather supports the opinions of Story and Washburn above quoted and the decision in Croke than the contention of complainants' counsel.

Powers of attorney by baron and *feme* to convey the lands of the wife were not unknown or unused in the early days of the Colonies. In McNayr's Conveyancing, published in Glasgow, 1789, is given a form of a letter of attorney "from husband and wife to sell a plantation, sugar-work and

negroes, and to execute the deed of conveyance" (p. 138), while in the Provincial Court of the Province of Maryland such a power of attorney appears not only to have been recognized by the court but judgment given in favor of the validity of the deed made thereunder as far back as 1738.

Elliott's Lessee *vs.* Osborn, 1 Harr. & McH. 146.

The policy in England being to recognize as valid joint powers of attorney by husband and wife to dispose of the lands of the wife as shown by the judgment in Croke, Car. *supra*, and the like being the policy in the Colonies as shown by the forms of conveyances as above referred to, and the judgment in Elliot *vs.* Osborne, the statutes of the province of Maryland of 1715 and 1766, being remedial in their nature, are to be liberally construed in line with that policy, and it is submitted that by a fair construction of those statutes, married women were authorized to execute, jointly with their husbands, valid powers of attorney for the conveyance by deed of the wife's interest in real estate.

This view is taken and learnedly treated by the court below (Rec., 78–80) by Mr. Chief Justice Alvey, who so long and ably presided over the Court of Appeals of Maryland.

> "At the common law, the conveyance of a *feme covert*, except by some matter of record, was absolutely void, and in England, until the St. 3 and 4 W. 4, Ch. 74, abolishing fines and recoveries, a *feme covert* could only pass her freehold estate, not held as her separate estate, by fine or common recovery. In Maryland, however, whose laws in force in 1801 were adopted for this District, and are still in force here, except where changed or modified by acts of Congress, the substitution of the ordinary deed of conveyance by the wife for fine or common recovery, was made by the Colonial Statutes of 1715, Ch. 47, 1752, Ch. 8, and 1766, Ch. 14; and the ceremony of private examination of the *femè covert*, and her voluntary acknowledgment of the deed, were made substi-

tutes for the private examination as to her voluntary consent in the levying of the fine or recovery.

"By the Act of 1715, Ch. 47, after declaring what nature of conveyances should be made, executed and recorded, in order to pass any freehold, or an estate for a term of more than seven years, then provides, that when the grantors or bargainors may live remote from the court or officer required to take the acknowledgment, in the county where the land was situated, such acknowledgment was authorized to be taken where the grantor or bargainor lived; and it is then further provided that '*if any such grantor or bargainor* of any lands or tenements, etc., shall happen to be out of the province, etc., at the time of the ensealing such writing, so as the same cannot be acknowledged, as is before directed, or enrolled within the time for that purpose hereinbefore limited, that *in every such case* such lands or tenements as aforesaid shall be acknowledged by *a letter of attorney*, well and sufficiently proved, etc., anything hereinbefore contained to the contrary thereof notwithstanding.' And, in a succeeding section of the same act, it is provided, 'that if any *feme covert* be named as grantor in any such writing *indented* [the indenting is dispensed with by Act of 1794, Ch. 57] the same shall not be in force to debar her or her heirs, except upon her acknowledgment of the same, and the person taking such acknowledgment shall examine her privately out of the hearing of her husband, whether she doth make her acknowledgment of the same willingly and freely, and without being induced thereto by fear or threats of, or ill usage by her husband, or fear of his displeasure.' This acknowledgment is required to be reduced to writing and certified by the judge or justice taking the same, and it is required to be recorded, and which acknowledgment so made shall bar the *feme covert* and her heirs. And so by the Act of 1766, Ch. 14, it is provided that *any person or persons* conveying land and not living within the province, so that the deed cannot be acknowledged as previously directed, then and in every such case the deed or conveyance shall be acknowledged by *letter of attorney*, well and sufficiently proved, etc.

And in a succeeding section of this last mentioned act, it is provided that any *feme covert* joining with her husband in any of the several kinds of conveyances thereinbefore mentioned, and acknowledging them upon private examination, according to the form and direction of the previous Act of 1715, where such *femes covert* have the right, title or interest of the lands, or any part thereof, intended to be conveyed, shall, by such execution, examination, acknowledgment and enrolment, be barred and foreclosed to all intents and purposes whatsoever. These provisions of the Acts of 1715 and 1766 were in force in this District in 1859, and are still in force, and they were in no respect repealed by or in conflict with the Acts of Congress of the 31st of May, 1832 (4 Stat. 520), and of the 20th of April, 1838 (5 Stat. 226), relating to the execution and acknowledgment of deeds for land in the District of Columbia. The Acts of Congress do not profess to repeal the Acts of Maryland of 1715 and 1766, or to be exclusive in their operation; but they have, in some particulars, not involved here, amplified and extended the provisions of the former statutes then in force. And construing these statutes altogether, and looking to the reason and policy upon which they are founded, it would seem to be clear that in the year 1859 and down to the year 1865, it was competent to a *feme covert*, by a joint power of attorney with her husband, duly executed and acknowledged according to the forms prescribed by the statute, to execute and acknowledge a valid deed of conveyance of her real estate situate in the District of Columbia. It is well settled that a power to convey land must possess the same requisites, and observe the same solemnities in execution and acknowledgment, as are necessary in a deed directly conveying the land; and that a title to land can only be acquired and lost according to the laws of the place where the land is situated. Clarke *vs.* Graham, 6 Wheat. 577. In this case, the property to be conveyed was specifically mentioned and described in the power of attorney; and the power of attorney was executed and acknowledged at Carlisle, in the State of Pennsylvania, by

husband and wife, under their hands and seals, and the acknowledgment and authentication of the instrument was in all respects in accordance with the provision of the statutes in force in the District of Columbia, providing the manner and form in which the real estate of *femes covert* could be conveyed. Indeed, we do not understand that the statutory requirement in respect to the form of acknowledgment and authentication thereof, is a matter of objection. The terms of the statutes, any "grantor or bargainor of any lands or tenements," being out of the province; or "any person or persons conveying," etc.; not residing in the province at the time, etc.; may acknowledge said deed by letter of attorney, well and sufficiently prooved, etc., are sufficient to embrace *femes covert*, authorized to sell and convey their real estate. If not, then the husband could not sell and convey by power of attorney, free of the contingent right of dower of his wife, for if the wife could not acknowledge by power of attorney a deed for the conveyance of her own real estate, she would be equally unable to acknowledge, by power of attorney, a deed for the relinguishment of dower in the lands of her husband. Such disability, we think, was never intended by the legislatures passing the statutes to which we have referred, to be fixed upon *femes covert*, having lands with right to convey the same."

See also Williams *vs.* Paine, 7 App. D. C. 116, 135, 138.

To deny validity to such instruments now, in a court of equity, upon no equitable ground would unsettle many ancient titles derived through such instruments.

1. The Act of March 3, 1865, cured any defect in the power of attorney.

Congress, by the act approved March 3, 1865, undertook to quiet and set at rest many questions as to the validity of titles, and it is submitted that by that act it has forever put an end to such contentions as are made by the complainants

in this case. The defendants having acquired title through the deed of partition executed in November, 1870, and recorded in December, 1870, claim under the original act (13 Statutes at Large, p. 531), which is, for the convenience of the court, printed in an appendix to this brief, and are not bound by any modifications introduced by the revision of 1874, their rights being determined by the law as it stood at the time they acquired title.

> "Rights acquired by a deed, will or contract of marriage or other contract executed according to statutes subsequently repealed subsist afterwards, as they were before, in all respects as if the statutes were still in force."
>
> Osborn *vs.* Nicholson, 13 Wall. 662.

The act of March 3, 1865, provides, *inter alia:*

> "That all deeds heretofore recorded in the land records of the District of Columbia . . . which have been executed and acknowledged by an attorney-in-fact, duly appointed for conveying real estate in said District, . . . and all deeds heretofore executed and recorded as aforesaid for the purpose of conveying land situated in said District, acknowledged by an attorney-in-fact, duly appointed, . . . who has acknowledged the same to be his act and deed instead of the act and deed of the grantor, . . . shall be and the same are hereby declared to be of the same effect and validity to pass the fee simple or other estate *intended* to be conveyed . . . in favor of parties in actual possession, claiming under and through such deeds as if such deeds had been . . . executed and acknowledged by the grantor in the deed . . . and as if such attorneys-in-fact . . . had acknowledged the deed to be the deed of the grantor.
>
> "And provided also, that when the power of attorney shall have [been] executed by a *feme covert* the same shall be effectual and sufficient if there shall have been such an acknowledgment of the same as would be sufficient under the provisions of this act to pass her estate and interest therein, were she a party executing the deed of conveyance."

The complainants' counsel contends (Brief p. 31) that the Act of March 3, 1865, could not have the effect of giving validity to this power of attorney, because it applies only to the acts of attorneys that a married woman could legally appoint as to some separate estate which she had a power to deal with as a *feme sole*, and as to which she could appoint an attorney.

As to this proposition, it is to be noticed that complainants' counsel do not explain why a statute should be passed validating powers of attorney which are already valid, and it is submitted that this act was designed not to declare good that which was clearly valid, but to declare to be effectual certain *attempted and intended* conveyances, which were either invalid or doubtful in law.

To confine the statute to valid and effective acts of parties would be to render it utterly nugatory, and to impute to the legislature imbecility of conduct and motive.

Nor is it any objection to the extension of the statute that it may embrace and render effectual acts which were void in law. In the case of Randall *vs.* Kreiger, 23 Wall. 137. a husband and wife residing in New York gave a power of attorney to one to sell and convey lands of the husband in the then Territory of Minnesota.

By the law of the territory no such power was valid, but two years after the attorney had executed the power, by a sale of the land, the legislature passed an act similar to this act, declaring all such conveyances to be as valid as if executed by the parties themselves. The husband had received the purchase money, and subsequently died leaving all his estate, consisting of personalty, to the widow, who now, after the land had advanced in value and been improved, set up a claim to dower in the land conveyed under the joint power of attorney of herself and her husband, on the ground that the same was void, and that, as is claimed here by complainants, the curative statute could not render her void act valid.

This court, in a very able and forcible opinion by Mr. Justice Swayne, sustained the act, however, declaring that the power of the legislature to "pass laws giving validity to past deeds which were before ineffectual is well settled" (p. 148), and proceeds as follows (p. 149):

> "To the objection that such laws violate vested rights of property it has been forcibly answered that there can be no vested right to do wrong. Claims contrary to justice and equity cannot be regarded as of that character. Consent to remedy the wrong is to be presumed. The only right taken away is the right dishonestly to repudiate an honest contract or conveyance to the injury of the other party. Even where no remedy could be had in the courts, the vested right is usually unattended with the slightest equity.
>
> "There is nothing in the Record persuasive to any relaxation in favor of the appellant of the legal principles which, as we have shown, apply with fatal effect to her case. The curative Act of 1857 has a strong natural equity at its root. *It did for her what she attempted to do, intended to do, and doubtless believed she had done, and for doing which her husband was fully paid.*
>
> "The purchase money for the lot became a part of his estate, and the entire estate was given to her at his death. Not satisfied with this, she seeks to fasten her dower upon the property in question.
>
> "The act accomplished what a court of equity, if called upon, would have decreed promptly as to the husband, and would have failed to decree as to the wife only from the want of power. The unbending rule of law as to *femes covert* in such case would have prevented it. *The legislature thus did what right and justice demanded, and the act strongly commends itself to the conscience and approbation of the judicial mind.*"

In view of this language of this court, it seems there can be no doubt as to the propriety of construing a curative act, and this particular act, to apply to conveyances which were invalid in law, and, indeed, such is the obvious purpose of the statute.

2. The Instrument Executed by George Gibson Huntt is Within the Relief of the Statute.

Counsel for appellees are unable to concur in the view taken by the learned Chief Justice in the court below (Rec. 84–85), that the instrument executed by George Gibson Huntt is not within the terms of the curative act of Congress of March 3, 1868.

It is to be remembered that the whole purpose of the statute is to reach informal and defective instruments, and that it is a statute which is to be liberally construed in favor of effectuating the intent of the parties, and not to be strictly construed so as to defeat that intent. It must be construed in harmony with and not against its purpose.

The language of the act addresses its curative provisions to "*all deeds for conveying any real estate or interest therein . . . to all deeds* heretofore executed *for the purpose* of conveying land," and declares that they "*shall have the same effect* to pass the fee simple or other estate *intended to be conveyed*" as if they had been free from the various enumerated defects.

It would be difficult to imagine language more adapted to these several instruments and their alleged defects than is in this act employed, as is pointed out by the learned chancellor in his opinion, (Rec , pp. 57, 58), and so applicable is the language of the statute to these instruments that he is led to say in his opinion:

> "Indeed, the marked identity of description would almost suggest that the draughtsman of the statute had these instruments before him when he was framing the law" (Rec., p. 58).

That the instrument executed by the attorney is a "deed" cannot be questioned, because it is under seal. Nor can it be denied that it was "executed and acknowledged by an attorney-in-fact duly appointed for conveying real estate situated in said district," the exact words of the statute, because

attached thereto is the power of attorney constituting him attorney-in-fact expressly to "bargain and sell, and in that event convey" (Rec. 21) this specific property.

In the deed executed by the attorney-in-fact he acknowledges the receipt of the purchase money and says he has "bargained and sold" to Tayloe the land in controversy. There is no where in the instrument the reservation of any further act to be done by the attorney to complete his act, so far as he is concerned. It would seem to be clear, therefore, that the payment of the purchase money, and the bargain and sale, passed to the purchaser all beneficial interest in and right to the property, whereupon it became, by virtue of the statute of uses, a conveyance of the land.

The subsequent covenant for a conveyance by the principals is nothing but a covenant for further assurance, and cannot, it is submitted, prevent the instrument from taking effect as a grant *in præsenti*, because it reserves no act to be done by the maker of the instrument. So far as George Gibson Huntt is concerned, he does not reserve for future exercise any power whatsoever, but covenants solely *as to his principals*, Robert and Mary Ransom, "that *they* shall and will, as soon as convenient, make and execute a proper deed of conveyance," &c. (Rec. 23). This covenant, so far from leaving anything to be done by the attorney, excludes that idea entirely, but merely covenants that the principals shall ratify and confirm the act of their agent.

This is totally different from the cases referred to in the brief of appellants (Brief, pp. 43, 44), and the opinion of the Chief Justice (Rec. p. 84, 85), where it was held not to be the *intention* of the parties to make a conveyance *in præsenti*, because in all those cases it will be found that something was reserved by the party who signed the paper acting *sui juris*, and not a covenant that some one not a party to the instrument should confirm what the party executing it had completely done.

3. Possession at the Time of the Passage of the Act Not Essential.

The appellants also contend that the act does not apply, because the defendants were not in possession on March 3, 1865. This is wholly unsupported by the facts in the Record. It is conceded that Tayloe, as tenant in common, had title in fee, and there was no one in adverse occupation. The tax title was acquired in 1864, and the deed from George Gibson Huntt in January, 1865. Clearly, where there was no adverse occupation, this is ample evidence of possession by Tayloe, at the date of the act.

But we submit that counsel are in error in assuming the act to refer to actual possession at the time of the passage of the act. This act was not passed for that day, but for all time, and if the words were to be limited to that time it would deprive the statute of almost all utility. The language is "in *favor* of parties in actual possession claiming under and through such deeds." This manifestly applies to possession at the time the deed is relied upon as a defense. It was the purpose of the act to "*quiet*" titles, and, therefore, it provided that persons in possession, claiming under such deeds, might *defend* by them; it was not its purpose to *disquiet* titles by permitting persons out of possession to *recover* by them.

The restricted construction insisted upon by complainants would deprive grantees now in possession of one who was in possession at the time of the passage of the act of all benefit of its provisions, a result too unreasonable to admit of consideration.

4. The Effect of the War upon the Power of Attorney and its Execution.

Mr. Justice Hagner, in the Equity Court, and Mr. Chief Justice Alvey, speaking for the Court of Appeals, each arrives at the conclusion that the war had no effect on the power of attorney in this cause, either to revoke or suspend

it. While there is some difference of method in reaching this conclusion in the two opinions, the views of both learned judges tend to enlighten the interesting subject and the court is respectfully referred to pages 62–65 of the Record, where Mr. Justice Hagner considers this point, and to pages 81–84, where the same subject is treated by Mr. Chief Justice Alvey.

It is broadly contended by appellants that the power of attorney in this case was revoked by the war. It is submitted that for this assertion there is no authority in any principle of public law, nor in any decided case, nor yet in any provision of the municipal laws of the United States.

It must be remembered that the paper in question was executed before the war—in 1859—by a sister and her husband to her only brother, with reference to the sister's share in lands held in common with her brother and sister, and with Ogle Tayloe, through whom appellees claim. The authority to sell and convey her undivided share of these lands was confided by Mrs. Ransom to her brother in contemplation of absence. It covered a considerable number of lots besides the property here in question.

It is quite clear that the land in the District of Columbia might have been partitioned by the court here during the war at the suit of either Tayloe or any of the other tenants in common, and that nobody could have claimed to interfere with the share of Mrs. Ransom except the United States, because of the fact that she and her husband were within the Confederate lines and her husband was an officer of the Confederate Army.

"The existence of war," says Mr. Justice Field, in Masterson *vs.* Howard, 18 Wall., p. 105—

> "does indeed close the courts of each belligerent to the citizens of the other, but it does not prevent the citizens of one belligerent from taking proceedings for the protection of their own property in their own courts against the citizens of the other, whenever the latter can be reached by process."

This court has held partition to be a matter of right in this District. Willard *vs.* Willard, 145 U. S., p. 120. Jurisdiction of the Ransoms could have been obtained in a partition suit by publication (Staffan *vs.* Zeust, 25 Wash. Law Rep. 188); and, moreover, they might have appeared in a suit by counsel. In MacVeigh *vs.* United States, 11 Wall., p. 267, this court says:

> "Whatever may be the extent of the disability of an alien enemy to sue in the courts of the hostile country, it is clear that he is liable to be sued, and this carries with it the right to use all the means and appliances of defense."

Speaking of that case Mr. Justice Miller says, in University *vs.* Finch, 18 Wall., p. 111:

> "If such be the rule in regard to alien enemies in a war between independent States, it should be quite as applicable, if not more so, between citizens of the same government who are only enemies in a qualified sense in a civil war."

In the case of Kershaw *vs.* Kelsey, 100 Mass., p. 561, Mr. Justice Gray, then (1868) an associate justice of the Supreme Court of Massachusetts, entered upon a complete and philosophical examination of the true principles of the law of nations and the decided cases as to the effect of war upon intercourse and contracts. The opinion is referred to in a note to the opinion of this court in the case of Conrad *vs.* Waples (1877), 96 U. S. 290, as—

> "the able and exhaustive opinion of the Supreme Court of Massachusetts . . . delivered by Mr. Chief Justice Gray,"—

and it will be found that there is no decision of this court, before or since Mr. Justice Gray's opinion in Kershaw *vs.* Kelsey, which is at variance with the principles he so clearly announces and so pointedly supports by reason and authority.

"This case," says Mr. Justice Gray (p. 562)—

> "presents a very interesting question requiring for its decision a consideration of fundamental principles of international law. It is universally admitted that the law of nations prohibits all commercial intercourse between belligerents without a license from the sovereign. Some dicta of eminent judges and learned commentators would extend this prohibition to all contracts whatever. In a matter of such grave importance the safest way of arriving at a right result will be to examine with care the principal adjudications upon the subject most of which were cited in the argument."

The learned justice then reviews the cases both in England and in this country, and announces the following conclusion (p. 572):

> "The result is, that the law of nations, as judicially declared, prohibits all intercourse between citizens of the two belligerents which is inconsistent with the state of war between their countries; and that this includes any act of voluntary submission to the enemy, or receiving his protection; as well any act or contract which tends to increase his resources; and every kind of trading or commercial dealing or intercourse, whether by transmission of money or goods, or orders for the delivery of either, between the two countries, directly or indirectly, or through the intervention of third persons or partnerships, or by contracts in any form looking to or involving such transmission, or by insurances upon trade with or by the enemy. Beyond the principle of these cases the prohibition has not been carried by judicial decision. The more sweeping statements in the text books are taken from the dicta which we have already examined, and in none of them is any other example given than those just mentioned. At this age of the world, when all the tendencies of the law of nations are to exempt individuals and private contracts from injury or restraint in consequence of war between their governments, we are not disposed

to declare such contracts unlawful as have not been heretofore adjudged to be inconsistent with a state of war.

"The trading or transmission of property or money which is prohibited by international law is from or to one of the countries at war. An alien enemy residing in this country may contract and sue like a citizen. 2 Kent. Com. 63. When a creditor, although a subject of the enemy, remains in the country of the debtor, or has a known agent there authorized to receive the amount of the debt, throughout the war, payment there to such creditor or his agent can in no respect be construed into a violation of the duties imposed by a state of war upon the debtor; it is not made to an enemy, in contemplation of international or municipal law; and it is no objection that the agent may possibly remit the money to his principal in the enemy's country; if he should do so, the offense would be imputable to him and not to the person paying him the money. Conn *vs.* Penn, Pet. C. C. 496. Denniston *vs.* Imbrie, 3 Wash. C. C. 396. Ward *vs.* Smith, 7 Wallace 447. Buchanan *vs.* Curry, 19 Johns. 137."

The learned Justice makes it quite clear that what the law of nations prohibits is not all intercourse or communication in time of war, or even all commercial intercourse or trade, because the belligerent sovereign may and does issue licenses to trade with the enemy. Undoubtedly the very nature of war prohibits all intercourse or communications between the citizens of the belligerents which tends to aid the enemy. This is, in the language of Mr. Justice Gray, "intercourse which is inconsistent with a state of war between their countries." But the primary object and general rule both concern an unlicensed commercial intercourse or trade with the enemy. War itself by its laws and customs requires certain intercourse and communication with the enemy in the exchange of prisoners of war, in communications by flag of truce, and even, in modern times, in arrangements for the care of the wounded and the burial of the dead. In former

times a ransom bond given to an enemy as the price of liberty made a lawful contract and debt which could be sued on after the war.

Though the controversy in Kershaw *vs.* Kelsey was in regard to chattels and chattel interests in land—certain corn and cotton and a lease of a plantation in Mississippi—the questions arose with reference to land, and the general principles applicable to land and interests therein are thus considered (p. 574):

> "Public international law, being the rule which governs the intercourse of one nation and its subjects with other nations and their subjects, is ordinarily limited, so far as rights of property and contracts are concerned, to movable, or, in the phrase of the common law, personal property, which is in its nature capable of being carried or transmitted from one country to the other; and does not usually touch private interests in immovable property or real estate; although any government may doubtless, by express law or edict, appropriate or confiscate for its own benefit the use, the profits, or even the title, of land within its own territory or occupation, belonging to subjects of the enemy. 3 Phillimore's International Law, 135, 731. Reed *vs.* Reed, 1 Munf. 619. Smith *vs.* Maryland, 6 Cranch, 286. Fairfax *vs.* Hunter, 7 Cranch, 622, 623, 631. Union Insurance Co. *vs.* United States, 6 Wallace, 759. The title of aliens in real estate is usually left to be regulated by the municipal law, and, under our system of government, by the laws of the several States, except so far as controlled by treaties with foreign powers" . . . (p. 575).
>
> "In regard to real estate, there is no difference between an alien friend and an alien enemy, except that the latter cannot maintain an action to recover it while the war lasts, and that it may be confiscated by an extraordinary act of the Government."

The learned justice then reviews the great case of Hunter *vs.* Fairfax, 7 Cr. 619, 620, and quotes the language of Mr. Justice Story, speaking for the majority of this court:

> "We do not find that, in respect to these general

> rights and disabilities, there is any admitted difference between alien friends and alien enemies. During the war, the property of alien enemies is subject to confiscation *jure belli*, and their civil capacity to sue is suspended. But as to capacity to purchase no case has been cited in which it has been denied."
>
> "Indeed, the common law in these particulars seems to coincide with the *jus gentium*."

And he further calls attention to the fact that the doctrine that an alien enemy might acquire title in lands by purchase during the war was again distinctly recognized and affirmed by this court in the case of Craig *vs.* Radford, 3 Wheat. 594.

There was nothing in the municipal law of the United States which forbid the transaction shown in this case.

The Act of Congress of 1861, Chapter 3, Section 5, and the proclamations issued by the President under that act, were expressly limited to forbidding all *commercial* intercourse between the States in insurrection and the citizens thereof and the citizens of the rest of the United States.

Speaking of the Act of 1861 and the President's proclamation, Mr. Justice Gray says, in Kershaw *vs.* Kelsey; *supra* (p. 576).

> "The act of congress and the proclamations of the President upon which the defendant relies in this case are in terms limited to the prohibition of commercial intercourse and the conveyance or transmission of goods and merchandise between the territories occupied by the two belligerents; and thus clearly manifests the intention of the government, in accordance with what we have seen to be the general law of nations, that commercial intercourse, and commercial intercourse only, should be prohibited."

And this court has announced the same conclusion:

> "It was commercial intercourse and correspondence between citizens of one belligerent and those of

> the other, the engaging in traffic between them, which were forbidden by the laws of war and by the President's proclamation of non-intercourse."
>
> Conrad *vs.* Waples, 96 U. S., page 287.

In the appellants' brief (p. 38) it is stated that by the Act of July 17, 1862, and the proclamation of the President, issued in pursuance of it—

> "all sales, transfers or conveyances of the estate and property of persons in rebellion after September 23, 1862, were made null and void."

But this court has decided, in the case of Conrad and Waples, 96 U. S. (p. 387–8), that—

> "the invalidity there declared was limited and not absolute. It was only as against the United States that the transfers of property liable to seizure were null and void. They were not void as between private parties or against any other party than the United States. This was so held in the case of Corbett *vs.* Nutt, reported in the 10th Wallace. There a devise (which for the purpose of the case was treated as included within the terms 'sales, transfers, and conveyances') of property situated in the District of Columbia, made by a resident enemy in the State of Virginia to a person as trustee, who also resided in that State, and held office under the Confederate Government, was held to pass a title good against all the world except the United States."

The case of Conrad *vs.* Waples involved the validity and effect of conveyances made in the Southern Confederacy by the elder to the younger Conrads, all within the Confederacy, of lands within the federal lines. This court upheld the transaction and reasons thus (p. 287).

> "If, then, intercourse between the Conrads, father and sons, they being all enemies, was not unlawful; if between them contracts for the purchase and sale of property, in respect to which there was no special interdict, would have been binding—the

sale in the case at bar can only be impeached, if at all by reason of the situation of the property within the Federal lines. And from that circumstance it could not be impeached, unless the sale, if upheld, in some way frustrated the enforcement of the right of seizure and confiscation possessed by the United States. It may be admitted that the right of a belligerent to confiscate the property of enemies found within its territory cannot be impaired by a sale of the property during the war, but it is not perceived that on any other ground the sale could be invalidated. A conveyance in such case would pass the title subject to be defeated, if the government should afterwards proceed for its condemnation. And to declare this liability was the object of the provision in the Confiscation Act, enacting that 'all sales, transfers, and conveyances' of property of certain designated parties made subject to seizure should be null and void. The invalidity there declared was limited and not absolute."

The learned justice continues, page 290:

"If an alien enemy can, by devise or purchase from a loyal citizen or subject, take an estate in the country of the other belligerent and hold it until office found, there would seem to be no solid reason for refusing a like efficacy to a conveyance from one enemy to another of lands similarly situated. A different doctrine would unsettle a multitude of titles passed during the war between residents of the insurrectionary territory temporarily absent therefrom whilst it was dominated by the Federal forces. Such residents were deemed enemies by the mere fact of being inhabitants of that territory, without reference to any hostile disposition manifested or hostile acts committed by them. In numerous instances, also, transfers of property were made in loyal States bordering on the the line of actual hostilities, by parties who had left those States and joined the insurgents. This was particularly the case in Missouri and Kentucky. No principle of public policy would be advanced, or principle

> of public law sustained, by holding such transfers absolutely void, instead of being merely inoperative as against the right of the United States to appropriate the property *jure belli*; on the contrary, such a holding would create unnecessary hardship, and therefore add a new cruelty to the war."

Some light is shed upon this subject by the decisions of this court in cases growing out of tax sales during the war.

In the case of United States *vs.* Lee, 106 U. S. 196, the owner of the life estate, Mrs. Lee, the wife of Gen. Robert E. Lee, was within the Confederate lines with her husband, and the owner of the reversion, Gen. Custis Lee, was in arms against the United States as a general officer of the Confederate Army; and yet the court clearly intimated (page 204) that the tender by Mr. Fendall of the amount of taxes was a good and lawful tender on behalf of Mrs. Lee.

In the case of Bennet *vs.* Hunter, 9 Wall. 337, young Hunter, in whose favor the tax sale was set aside, was an officer in the Confederate Army. The opinion in that case was delivered by Mr. Chief Justice Chase, and after holding untenable the contention that the payment of taxes could only be made by the owner in person, he continues (page 337):

> "But to whom did the right to make this payment belong? The obvious answer is, to the owner, either acting in person or through some friend or agent, compensated or uncompensated."

This doctrine is affirmed in Tacey *vs.* Irwin, 18 Wall. 549. In the case of Atwood *vs.* Weems, 99 U. S. 183, the same doctrine is affirmed, and the court in its opinion adverts to the fact that in refusing one offer to pay the tax, the clerk said to the party tendering the money to redeem the land in behalf of Weems, who was in the Confederacy, that "*he would take the money from no one but the owner, and he might as well talk of paying tax for Jeff Davis,*" and yet this court held the tender good and the land redeemed.

Where, in time of war, an executory contract made before the war between residents of the belligerent States may be completely executed without commercial intercourse—where an obligation contracted before the war between those who have become enemies, can be honestly discharged without such intercourse—where an obligation is by circumstances imposed upon a resident in the territory of the other—or such an obligation is voluntarily assumed—and no commercial intercourse is necessary to complete it, in all three of these cases, by the principles of modern public law, and by the policy of municipal laws in modern times, such acts are lawful and valid; the contract would be well executed in the first case-the obligation would be validly and justly discharged in the second; and validly and justly assumed in the third.

In the case of ordinary debts, which are subsisting contracts, rights, and obligations, where they cannot be paid without intercourse, war suspends but does not extinguish them. In the supposed cases the war may delay some consequence or sequel requiring commercial intercourse, but it does not invalidate the act accomplished without unlawful intercourse, and does not prevent, on the return of peace, the ratification or acceptance of what may have been thus lawfully accomplished.

No authoritative decision holds a power of attorney such as the one in this case to be revoked by the war. And no case can be found where such a power acted on by both parties has been held illegal or void.

If it is to be treated as an agency created before the war, there was nothing unlawful in its continuance, and all the circumstances surrounding the creation of the agency, the good faith of its continuance and the final execution of the power without a single illegal incident done or attempted, make it a transaction which is binding as well as lawful. But if anything were needed to complete its binding effect

we have the plain and prompt ratification of it after the war when commercial intercourse was no longer suspended, and when the agent accounted to the principal, and the principal accepted the avails of the acts done in her name and otherwise ratified them by her conduct then and ever after.

This case bears no analogy to those decided cases in regard to agencies where the circumstances of the relation of principal and agent, and the conduct of both principal and agent clearly negatived any possible inference of the lawful continuance of the agency. In none of those cases was it possible to infer an intent on the part of principal and agent to lawfully continue and act upon a relation lawfully created and to ratify and confirm acts lawfully done in pursuance of it.

The result of the best considered cases may be safely stated thus: Everything in aid of the enemy and all unlicensed commercial intercourse and trade between belligerents is forbidden and unlawful, and this, by the mere fact of war, without any declaration by the laws of either belligerent. Pre-existing debts which cannot be collected or discharged without commercial intercourse are not extinguished, but only suspended, and pre-existing executory contracts, debts, or obligations, which require no commercial intercourse for their execution or discharge, may be validly and lawfully executed and discharged, notwithstanding the existence of war.

> "I can collect but two principles from the cases cited by the counsel for the defendant, and they are principles on which there never was the slightest doubt. First, that a contract made with an alien enemy in time of war, and that of such a nature that it endangers the security, or is against the policy of this country, is void. Such are policies of insurance to protect an enemy's trade. Another principle is, that however valid a contract originally may be, if the party become an alien enemy he cannot sue. The crown during the war, may lay hands on the

debt and recover it, but if it do not, then, on the return of peace the rights of the contracting alien are restored, and he may himself sue. No other principle is to be deduced."

Chief Justice Gibbs in Antoine *vs.* Marshead, 6 Taunt. 237–9 (cited in Kershaw *vs.* Kelsey *supra*).

"The war suspended the remedy by suit on the contract; *but it is not unlawful,* voluntarily to pay debts, or perform contracts, to alien enemies, if the payment be made or the duty be performed in our country."

Buchanan *vs.* Curry, 19 Johns. 137–141.

"If the contract can be carried into execution, notwithstanding the war, without conflicting with the obligation of allegiance to either party, it will neither be dissolved nor suspended."

Manhattan Ins. Co. *vs.* Warwick, 20 Grattan, 630.

"It does not follow that the agent, if he receives the money, will violate the law by remitting it to his alien principal."

. . . . . .

"Nor can the rule apply when one of several joint debtors resides within the same county with the creditor, or with the known agent of the creditor."

Ward *vs.* Smith, 7 Wall. 452, 453.

The character of agencies which have been held to be revoked by the war are all commercial agencies requiring commercial intercourse. Certainly the agent of an insurance company is peculiarly such an agent, and the collection of premiums of insurance by an agent for a company bears no analogy to the collection of an ordinary debt by an agent for his principal. The very essence of the insurance business is the massing of all the premiums in the hands of the company that they may be invested and used in the fiscal

operations of the company by which alone it offsets its risks and losses.

This court, in the case of Insurance Co. *vs.* Davis, 95 U. S. 425, cited by appellants' counsel, announce a principle which counsel for appellants seems to have overlooked.

The court first qualifies the proposition that war will revoke an agency, because of the inability of the principal and agent to communicate with each other, by the statement "*unless continued by the mutual assent of the parties*," and then proceeds:

> "If the agent continues to act as such, and his so acting is *subsequently ratified* by the principal, or *if the principal's assent is evinced by any other circumstances*, then third parties may safely pay money, for the use of the principal, into the agent's hands," (pp. 429, 430);

and again, (p. 431):

> "Perhaps it may be assumed that an agent *ante bellum* who continues to act as such during the war, in the receipt of money or property on behalf of his principal, where it is to the manifest interest of the latter that he should do so, as in the collection of rents or other debts, *the assent of the principal will be presumed*, unless the contrary be shown; but that, where it is *against his interest*, or would impose upon him some new obligation or burden, his assent will *not be presumed*, but must be proved, *either by his subsequent ratification or in some other manner*. . . . *In some way*, however, it must appear that the alleged agent *assumed to act* as such, and that the alleged principal *consented to his so acting*."

It is quite obvious, therefore, that the *fact* of war does not revoke an agency as *matter of law*, but that whether it operates as a revocation or not, depends upon all the circumstances.

And how stands the case here? While communication was not permitted during the war, it appears that in this

case it was going on constantly (Rec., p. 36), yet no attempt to revoke was ever made, and certainly the act of the agent was ratified and confirmed in the most unequivocal manner immediately after the war by the acceptance of the purchase money.

Much slighter evidence than is contained in this record has been held by this court to establish a ratification.

Lyon *vs.* Pollock, 99 U. S. 673.

Moreover, it is nowhere alleged that Mrs. Ransom and her husband did not know all that was being done and assent thereto; nor is any circumstance alleged tending to show that they ever in any way objected to what had been done, although there was every motive for them to object during Mrs. Ransom's lifetime, had she considered there was any just reason for so doing. It cannot be replied that she was restrained by her husband from attacking the validity of this transaction, because it appears that he instituted a suit to recover the property after her death. Indeed, the irresistible conclusion is that he would have brought suit in her *lifetime* had it not been for the fact that, either her co-operation could not be procured, or her testimony would have been fatal to his claim.

The act of March 3, 1865, to quiet titles in this District was passed *flagrante bello*, but made no exception excluding such powers of attorney; and this attitude of Congress, as to titles in this District, clearly indicates its purpose to leave no possibility of exception by reason of the war.

And, in this connection, it must be remembered that in any case where the special circumstances should make it proper, the courts were open to any one to show these circumstances and ask relief; but with this act before him, and its consequences plain, no one could lie supine, and leave a heritage of litigation to his posterity. The statute was a statute of repose, designed to quiet titles and prevent litigation—it contained no exception—and was meant to

validate the execution of plainly declared intentions, in accordance with the acts of the parties, and in a manner which could not injuriously affect the honestly acquired rights of any third parties.

There was no principle of public law which of itself revoked this power of attorney.

There was nothing in the municipal laws of the United States which tended to weaken its authority, or to prevent its execution except as against the United States.

5. Effect of the Receipt of Purchase Money.

It is further insisted that the decree should be reversed because the receipt of purchase money does not estop a married woman, and under this head a number of authorities are cited holding that the legal estate of a married woman cannot pass by estoppel against the provisions of the statutes regulating conveyancing by her.

It is not necessary to invoke the doctrine of conveyance by estoppel in this case.

The complainants, standing in the place of their mother, have come into equity asking relief. In such a situation a married woman and those claiming through her are as much bound by the principles and practice of equity as other persons. They must alike show that they have an equity for relief, and they also must do equity if they seek equity.

The claim here is founded wholly upon a supposed legal infirmity in a conveyance, and the maker of that instrument asks relief from it upon no equitable grounds whatever. It is in just such cases that this court has denied relief.

In Chilton *vs.* Braiden's Admx., 2 Black, 460, 461, the court say:

> "When one person has got the estate of another, he ought not, in conscience, be allowed to keep it without paying the consideration;"

and further,

> "neither the answer of the party, nor the argument of counsel, allege any good reason why a *married woman should be permitted to take property without paying for it more than another. The disabilities thrown around her are for her protection, not to enable her to commit a fraud.*"

And again, this court in the case of Bank *vs.* Partee, 99 U. S. 325, 329, say:

> "*Their approval of or at least acquiesence in the conduct of their agents estops them in equity* from enforcing the provision as to the acceptance in writing, so as to debar from the benefits of the deed any creditors who accepted the settlement by surrendering the old notes and taking the new ones. *A married woman cannot be permitted any more than an unmarried one, to retain the benefits of a transaction which she has solicited, and at the same time to disavow it.*"

In Bein *vs.* Heath, 6 How. 228, 247, the court say:

> "For if it were admitted that to make the loan binding on the wife it must be proved to have enured to her use, yet if, through the fraudulent intervention of her husband, she negotiated the loan, *giving to it her special sanction, equity would not relieve her.* A doctrine contrary to this would enable the wife to practice the grossest frauds with impunity. . . . Under such circumstances, we think the complainant cannot invoke the aid of a court of chancery. She has acted against conscience in procuring the funds of the mortgagee. *The law protects her, but it gives her no license to commit a fraud against the rights of an innocent party.*"

See also—

Bedford *vs.* Burton, 106 U. S. 338.
Gridley *vs.* Wyant, 23 How. 500.
Gridley *vs.* Westbrooke, 23 How. 503.

Unless, therefore, a married woman shows an equity to

relief she cannot obtain the aid of chancery, nor can she obtain its aid to do that which is against conscience.

6. The Equities of the Case.

Finally the appellants contend that the equities of the case are with complainants.

This is founded, in part, upon an erroneous view of the facts, and in part upon strange and novel ideas of equity.

The deed to Tayloe by the attorney-in-fact was acknowledged January 4, 1865 (Rec., p. 23). On January 7, 1865, Judge Cox sent Mrs. Ransom's share to her sister, Mrs. Gibson (Rec., p. 52). Mrs. Gibson swears that she either turned this money over to Mrs. Ransom, or expended it for her by her direction (Rec., pp. 36, 37). That she met her sister immediately after the war in Richmond in 1865 (Rec., p. 37).

It is inconceivable, if Mrs. Gibson's and Judge Cox's testimony be true (and no attempt is made to deny or contradict it) that Mr. and Mrs. Ransom did not know that Mrs. Ransom's brother George had sold the property, and that the money which Mrs. Ransom received was from that source, for it nowhere appears that she could have expected it from any other source.

Moreover, that she knew she had once claimed an interest in the property cannot be denied, as it is specifically described in the paper executed by her. Yet when she came to Washington after the war, so far impoverished as to be seeking Government employment (Rec., p. 48), she made no inquiry about the property, and though she lived till 1881, sixteen years after the deed was made and twenty-two years after the power of attorney was given, she never questioned the validity of the transaction, nor did her husband while she was alive to speak.

The price obtained was full and fair (Rec., p. 46), and her brother and sister parted with their interest at the same price. The sale was made at the instance of the Ransoms, in

good faith, and for their benefit (Rec., p. 39), and Tayloe paid the money and the Ransoms got it (Rec., p. 46).

On the faith of this transaction Tayloe paid his money and Mrs. Paine, his daughter, acquired the property for full value by the partition deed (Rec., p. 69), and after bearing the burden of taxation when the land was unremunerative, and after having handsomely and expensively improved it, the defendants claiming and holding under Tayloe and his daughter are asked to surrender it to complainants, who can show no better equity than an accidental omission of their mother to confirm her act by an unassailable deed. They are in precisely the same situation as was Mrs. Randall in Randall *vs.* Krieger, *supra*, whose pretended equity is so severely condemned by this court in that case.

It is to the credit of Mrs. Ransom that she never did any act looking to an attempted repudiation of the authorized sale of her property. She having the avails thereof, the eminently high character of herself and sister and brother and all concerned in the transaction, as shown by the testimony in the record, fully explains why she never attempted to impeach it in any way.

Indeed, it would be difficult to imagine a case more utterly devoid of equity than the one made by complainants here. There is no testimony, there is not even an averment, relating to any equitable right. The whole case is based upon a theory which, if correct, would have enabled the complainants to recover at law in the abandoned actions of ejectment, namely, that the power of attorney and deed made in pursuance of it are *void in law*. There is not a suggestion, that if valid in law there is or could be any equitable relief against these title papers.

On the last page of the brief for appellants the following proposition is stated:

"*The bill should in no event have been dismissed absolutely, but should have been without prejudice.*"

It is not perceived on what principle of equity jurispru-

dence or practice the court could uphold the dismissal of a bill like the present without prejudice, where the record disclosed that the complainants had already abandoned three law suits on the same subject, and had brought their controversy for settlement into a court of conscience.

It is respectfully submitted that the decree of the court below dismissing the bill should be affirmed.

CALDERON CARLISLE,
WILLIAM G. JOHNSON,
Counsel for Appellees.

APPENDIX.

An act to quiet titles in favor of parties in actual possession of land situated in the District of Columbia.

[13 Stat. 531.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That all deeds heretofore recorded in the land records of the District of Columbia, which have been executed and acknowledged by *femes covert* (their husbands having signed and sealed the same) for conveying any real estate or interest therein, situated in said district; and all acknowledgments of deeds heretofore recorded, as aforesaid, which have been made by *femes covert* (whether they have executed the deed or not) for the purpose of releasing their claims to dower in the lands described therein, situated as aforesaid, in which acknowledgments the form prescribed by law has not been followed; and all deeds heretofore recorded, as aforesaid, which have been executed and acknowledged by an attorney-in-fact, duly appointed for conveying real estate situated in said district; and all deeds heretofore recorded, as aforesaid, executed and acknowledged, or only acknowledged by such attorney-in-fact, for conveying real estate situated in said district, as to which the acknowledgement was made before officers different from those before whom proof of the power of attorney was made, and as to which the power of attorney was proved before only one justice of the peace; and all deeds heretofore executed and recorded as aforesaid, for the purpose of conveying land situated in said district, acknowledged out of the District of Columbia before a judge of a United States court, or before two aldermen of a city, or the chief magistrate of a city, or before a notary public; and all deeds heretofore executed and recorded, as aforesaid, for the purpose of conveying land situated in said district, acknowledged by an attorney-in-fact, duly appointed, or by an officer of

a corporation duly authorized, who has acknowledged the same to be his act and deed, instead of the act and deed of the grantor or of the corporation; and all deeds heretofore executed and recorded, as aforesaid for the purpose of conveying land situated in said district to which there is not annexed a legal certificate as to the official character of the officer or officers taking the acknowledgment, shall be, and the same are hereby, declared to be of the same effect and validity to pass the fee simple or other estate intended to be conveyed, and bar dower in the real estate therein mentioned in favor of parties in actual possession, claiming under and through such deeds, as if such deeds had been by such *femes covert* executed and acknowledged, or acknowledged in case of a dower right, in the form heretofore prescribed by law; as if such deeds had been executed and acknowledged by the grantor in the deed; as if such power of attorney had been proved before the officer or officers taking the acknowledgment; as if such power of attorney had been proved before two justices of the peace; as if such acknowledgment had been made before any judge of a State court, or before two justices of the peace; as if such attorneys-in-fact or officer of a corporation had acknowledged the deed to be the deed of the grantor or of the corporation; as if such deeds had thereto annexed a certificate in legal form that the officer or officers taking the acknowledgment were really what they purport to be: *Provided*, That the certificate of acknowledgment by a *feme covert* shall show that the acknowledgment was made "apart" or "privily" from her husband, or use some other term importing that her acknowledgment was made out of his presence, and also that she acknowledged or declared that she willingly executed or that she willingly acknowledged the deed, or that the same was her voluntary act, or to that effect: *And provided, also*, That when the power of attorney shall have [been] executed by a *feme covert* the same shall be effectual and sufficient if there shall have been such an acknowledgment of the same

as would be sufficient, under the provisions of this act, to pass her estate and interest therein were she a party executing the deed of conveyance, the record and copy thereof of any deed recorded as aforesaid to be evidence thereof, in the same manner and to have the same effect as if such deed had been originally executed, acknowledged, and recorded according to law.

SEC. 2. *And be it further enacted*, That all exceptions in favor of parties beyond the District of Columbia, which may by existing laws be replied or relied on in any action or proceeding brought in said district, are hereby repealed and abrogated: *Provided*, That this section shall not affect the right of parties in actions now pending, and such as may be brought within three years from the passage of this act.

SEC. 3. *And be it further enacted*, That the acts of Congress approved May thirty-first, eighteen hundred and thirty-two, and April twenty, eighteen hundred and thirty-eight, in reference to the acknowledgment and recording of deeds of land situated in said district, shall be taken and construed as cumulative with the acts of Maryland on the same subject, in force in said district at the passage thereof; and that an acknowledgment made and certified in compliance with any one of said acts, and before any officers authorized by either of said acts to take an acknowledgment (whether in or out of the District of Columbia), shall be good and effectual; and if it shall appear that the grantor "acknowledged said deed," it shall have the same effect as if he or she acknowledged the deed to be his or her act and deed. And any acknowledgment made by a *feme covert* under either of said acts of Congress (which shall be sufficient under the provisions of this act) of any deed executed by her husband, and heretofore recorded in the District of Columbia, shall be good and effectual to bar all claim on her part to dower in the lands described therein, situated in said district, although she shall not have executed the same.

Approved March 3, 1865.

WILLIAMS *v.* PAINE.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 114. Argued November 29, 30, 1897. — Decided January 10, 1897.

Under the laws of Maryland, which were in force in the District of Columbia in 1859, it was competent for a married woman, outside of the District, to execute, with her husband, a power of attorney to convey her lands therein, which, when acknowledged by her according to the statute relating to the acknowledgment by married women of deeds conveying their real property in the District, thereby became a valid and sufficient instrument to authorize the conveyance by attorney; and the first section of the act of March 3, 1865, c. 110, 13 Stat. 531, contains a clear legislative recognition of the right to execute such power.

Such a power of attorney, executed in one of the Northern States before the civil war by a married woman then residing there, was not revoked by the fact that when that war broke out she and her husband removed to the Southern States, where he entered the Confederate service, and where she resided to the close of the war.

When the purchase money for land sold under such a power is received by the principal, to permit her heirs after her death to repudiate the transaction, on the ground that the power of attorney had been revoked by the war, would be in conflict with every principle of equity and fair dealing.

A majority of the court think that the deed made under the power of attorney which is in controversy in this suit, and which is printed at length in the Statement of the Case, below, was in the nature of a conveyance of the legal title, though defectively executed, and that it came within the provisions of the act of March 3, 1865, and its defective execution was thereby cured.

By this disposition of the whole case upon the merits the court is not to be considered as deciding that parties situated as the plaintiffs were in this case, out of possession, can maintain an action for partition.

THE appellants herein brought this suit in the Supreme Court of the District of Columbia for the purpose of obtaining

partition of certain lands in the city of Washington, known as square 53 of the ground plan of that city.

Upon the trial it appeared that the common source of title was one George W. Peter, who, in January, 1837, conveyed the premises to Henry Huntt and Benjamin Ogle Tayloe as tenants in common. Mr. Huntt died in 1838 intestate, leaving two daughters, Fannie and Mary, and a son named George Gibson Huntt, to whom his undivided interest in these lands descended. Fannie married an officer in the United States Army named Gibson, and Mary married an officer in that army named Robert Ransom, Jr. In May, 1859, Lieutenant Ransom was stationed at Carlisle Barracks in Pennsylvania, and at that time he and his wife executed and acknowledged a power of attorney to the brother of Mrs. Ransom, to convey their interest in the land, the material part of which power reads as follows:

"Know all men by these presents, whereas Lieut. Robert Ransom, Jr., of the United States Army, and Mary his wife in right of the said Mary are seized in fee-simple as tenants in common, with the sister and brother of the said Mary, to wit, Fanny Huntt and George Gibson Huntt and with B. O. Tayloe of certain lots of ground in the city of Washington in the District of Columbia, which are described as follows: [Describing among others the lots in question.] To provide for the contingency of our absence we, the said Robert Ransom, Jr., and Mary my wife, do by these presents constitute and appoint and in our place put and depute the said George Gibson Huntt, of Washington city aforesaid, to be our true and lawful attorney in fact for us, and in our name place and stead to control, manage, grant, bargain and sell, and in that event convey all our right, title and interest in and to the said lots and square of ground or any part or parts thereof, or to join in and for us and in our name to sign any proceedings in partition of the said lots and square, or to appear for us in court for that purpose; and in regard to the said real estate to do, execute and perform every act and thing necessary to be done as fully and amply as we might or could do if personally pres-

ent, and we do hereby ratify and confirm all and whatsoever our said attorney in fact may legally do in the premises.

"In witness whereof we, the said parties to these presents, have hereunto set our hands and seals this twenty-third day of May, A.D. one thousand eight hundred and fifty-nine.

"Witnesses present: R. RANSOM, Jr. [SEAL.]
"S. H. GRAHAM. M. H. RANSOM. [SEAL.]
"A. L. SPONSLER."

This paper was duly acknowledged by both Lieutenant Ransom and his wife, the latter of whom made the acknowledgment necessary to be made in the District of Columbia in order to convey real estate by a married woman.

The acknowledgment and the certificate thereof are full and complete, and taken and certified by a proper officer.

The premises in question at that time were vacant lots. Soon after the execution of this power of attorney, Lieutenant Ransom was ordered away, and, with his wife, he left the station at Carlisle Barracks and went to Fort Lyon in the western country. He was a native of one of the Southern States, and when the war broke out he resigned his commission in the army and entered the Confederate service, and at the conclusion of the war he had risen in that service to the rank of general. Mrs. Ransom's brother, George Gibson Huntt, to whom the power of attorney above mentioned was given, remained in the old army. At the conclusion of the war General Ransom returned with his wife to his native State, North Carolina, where she died in February, 1881, leaving a number of children who are complainants herein. He remained in that State until his death in January, 1892.

During the continuance of the war, the children of the deceased Mr. Huntt became anxious to sell their interest in the premises in question, as the land was still vacant and unimproved, and a source of expense in the way of the payment of taxes. It was more particularly on account of Mrs. Ransom that the sale was desired, in order to aid her as far as possible by turning her interest in the lands into money. Negotiations for the sale of the property were therefore com-

menced some time in 1864 through a real estate agent employed by Mr. Walter S. Cox, a distant relative of the parties and then a practising lawyer at the bar of the District, now one of the Justices of the Supreme Court thereof. These negotiations resulted in the sale of all their interest in the property to Mr. Tayloe, the owner of the other half interest therein, and deeds were duly given therefor by Mrs. Gibson and Mr. Huntt to Mr. Tayloe, and on the 29th of November, 1864, Mr. Huntt, assuming to act under the power of attorney already mentioned, executed, acknowledged and delivered to Mr. Benjamin O. Tayloe a paper which reads as follows:

"Know all men by these presents, that I, George Gibson Huntt, by virtue of the annexed power of attorney to me from Robert Ransom, Jr., and Mary Ransom, his wife, and for and in consideration of the sum of eight hundred and thirty-three $\frac{33}{100}$ dollars to me in hand paid by Benjamin Ogle Tayloe, of the city of Washington in the District of Columbia, the receipt of which is hereby acknowledged, have bargained and sold to said B. O. Tayloe, his heirs and assigns, all the right, title and estate of them, the said Robert Ransom, Jr., and Mary Ransom, being one undivided third part of, in and to those pieces of ground in the city of Washington aforesaid, known and described as lots Nos. one and three in square No. five, lot No. ten in square No. fourteen, lots Nos. five and nine in square No. seventeen, lots Nos. three and four in square No. twenty-eight, lot No. three in square No. thirty and the whole of square No. fifty-three, with the improvements and appurtenances; and I hereby further agree in behalf of said Robert and Mary Ransom, that they shall and will, as soon as convenient, make and execute a proper deed of conveyance of said premises to said Benj'n O. Tayloe, in fee-simple.

"In testimony whereof I have hereunto set my hand and seal this 29th day of November, A.D. 1864.

"GEORGE GIBSON HUNTT. [SEAL.]

(Stamp, $1. G. G. H. Jan. 4th, '65.)

"Witness: W. Kline."

This paper was acknowledged by Huntt before officers dif-

ferent from those before whom proof of the power of attorney was made. It was also and on the 14th day of January, 1865, recorded in the proper land records office in the District of Columbia, together with the power of attorney already referred to.

The purchase price of the lands was paid to Mr. Cox, who promptly paid over her share to Mrs. Gibson, and also included in such payment the share belonging to Mrs. Ransom, and Mrs. Gibson duly paid over Mrs. Ransom's share to her or expended the same for her benefit and with her approval. This was done prior to the close of the war, while Mrs. Ransom was within the lines of the Southern army with her husband, and Mrs. Gibson was in one of the Northern States.

After the death of Mr. Tayloe, which occurred in 1868, one of his daughters, Julia Tayloe, in November, 1870, succeeded, under proceedings in partition, to all the interest of her father in the premises. She married in 1865 the defendant, John W. Paine, and the other three defendants are the children of such marriage. From the time of the division of the estate of Mrs. Paine's father, Mr. Tayloe, which took place in 1870, his daughter, Mrs. Paine, claimed to be the owner of the property, and was in possession thereof, renting it through her husband and his agents, for a coal yard and for other purposes, and paying the taxes upon the same up to the time of her death in 1872, since which time her husband has been in possession, claiming the right as tenant by the courtesy, and his three children claim title in fee, subject to the life estate of their father.

Prior to the filing of this bill Mr. Paine had expended large sums of money in building twenty-two dwelling houses on the property at a cost of about $125,000, and has received the rents from such houses and paid the taxes on the property, the whole property being now estimated to be worth about $250,000. The sum at which the property was sold in 1864 was a fair price for the same and the best that could be secured after earnest efforts made to sell it.

After the death of Robert Ransom and his wife this bill was filed by their children, and the relief sought is to have

the paper executed by Mrs. Ransom's brother, George Gibson Huntt, under the power of attorney given by her husband and herself, declared null and void as a cloud upon the title of the complainants in this property, and the bill then asks that the right of the complainants to a one sixth (Mrs. Ransom's alleged) interest in the land in fee as tenants in common with the defendants may be established against all the defendants, as well the life tenant as the reversioners, and the land partitioned accordingly.

Upon these facts the Supreme Court of the District of Columbia dismissed the bill with costs, and its judgment to that effect, having been affirmed by the Court of Appeals of the District, 7 D. C. App. 116, the case is now here upon the complainants' appeal from that judgment of affirmance.

Mr. Franklin H. Mackey for appellants.

Mr. Calderon Carlisle and *Mr. William G. Johnson* for appellees.

Mr. Justice Peckham, after stating the case, delivered the opinion of the court.

The questions in this case grow out of the execution of the power of attorney by Lieutenant Ransom and his wife while at Carlisle Barracks, Pennsylvania, in 1859.

It is claimed on the part of appellants, (1) that the power of attorney given by Mrs. Ransom, a married woman, (jointly with her husband,) could not operate as a valid authority to the attorney named therein to convey her real estate, because a married woman could not convey real estate by a power of attorney; (2) that the power of attorney was revoked by the war; (3) that the paper executed by the attorney in fact pursuant to the power of attorney was not a conveyance, and did not pass the title of Mrs. Ransom to Mr. Tayloe; (4) that these difficulties were not cured by the act of Congress of March 3, 1865, c. 110, 13 Stat. 531, entitled "An act to quiet

titles in favor of parties in actual possession of lands situated in the District of Columbia," as that act only applied to instruments conveying lands and to parties who were in actual possession at the time when the act was passed, and the paper executed by the attorney was not a conveyance, and when the act was passed the premises in question were vacant; (5) that the purchase price for her interest in that land was never received by Mrs. Ransom, and her heirs are not estopped from setting up the invalidity of the alleged contract of sale or conveyance upon any equitable grounds.

The first section of the above act is set out in the margin.[1]

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[1] *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That all deeds heretofore recorded in the land records of the District of Columbia, which have been executed and acknowledged by femmes covert (their husbands having signed and sealed the same) for conveying any real estate, or interest therein, situated in said District; and all acknowledgments of deeds heretofore recorded, as aforesaid, which have been made by femmes covert (whether they have executed the deed or not) for the purpose of releasing their claims to dower in the lands described therein, situated as aforesaid, in which acknowledgments the form prescribed by law has not been followed; and all deeds heretofore recorded, as aforesaid, which have been executed and acknowledged by an attorney in fact, duly appointed for conveying real estate situated in said District; and all deeds heretofore recorded, as aforesaid, executed and acknowledged, or only acknowledged by such attorney in fact, for conveying real estate situated in said District, as to which the acknowledgment was made before officers different from those before whom proof of the power of attorney was made, and as to which the power of attorney was proved before only one justice of the peace; and all deeds heretofore executed and recorded as aforesaid for the purpose of conveying land situated in said District, acknowledged out of the District of Columbia, before a judge of a United States court, or before two aldermen of a city, or the chief magistrate of a city, or before a notary public; and all deeds heretofore executed and recorded as aforesaid for the purpose of conveying land situated in said District, acknowledged by an attorney in fact, duly appointed, or by an officer of a corporation, duly authorized, who has acknowledged the same to be his act and deed, instead of the act and deed of the grantor or of the corporation; and all deeds heretofore executed and recorded as aforesaid for the purpose of conveying land situated in said District to which there is not annexed a legal certificate as to the official character of the officer or officers taking the acknowledgment, shall be, and the same are hereby, declared to be of the same effect and validity to pass the fee-simple or other estate intended to be conveyed, and bar

Very careful and well-considered opinions have been delivered in the case, both in the Supreme Court and in the Court of Appeals of the District, in which these various questions are discussed. The Supreme Court held that the two papers (the power of attorney and the instrument executed in pursuance thereof) were so far valid as to be subject only to such objections and defects of form of execution and acknowledgment as could be cured by legislation, and these defects were cured by the act of Congress; that this statute was constitutional, and that the power of attorney was not revoked by the war, but was in full force and valid when the deed by the attorney was executed. The court also thought the defence which had been set up, that the complainants were at the commencement of the suit and thereafter out of possession and their title denied by the defendants, who were

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dower in the real estate therein mentioned in favor of parties in actual possession, claiming under and through such deeds, as if such deeds had been by such femmes covert executed and acknowledged, or acknowledged in case of a dower right, in the form heretofore prescribed by law; as if such deeds had been executed and acknowledged by the grantor in the deed; as if such power of attorney had been proved before the officer or officers taking the acknowledgment; as if such power of attorney had been proved before two justices of the peace; as if such acknowledgment had been made before any judge of a state court, or before two justices of the peace; as if such attorneys in fact or officer of a corporation had acknowledged the deed to be the deed of the grantor or of the corporation; as if such deeds had thereto annexed a certificate, in legal form, that the officer or officers taking the acknowledgment were really what they purport to be: *Provided*, That the certificate of acknowledgment by a femme covert shall show that the acknowledgment was made "apart" or "privily" from her husband, or use some other term importing that her acknowledgment was made out of his presence, and also that she acknowledged or declared that she willingly executed or that she willingly acknowledged the deed, or that the same was her voluntary act, or to that effect: *And provided, also*, That when the power of attorney shall have [been] executed by a femme covert the same shall be effectual and sufficient if there shall have been such an acknowledgment of the same as would be sufficient, under the provisions of this act, to pass her estate and interest therein were she a party executing the deed of conveyance, the record and copy thereof of any deed recorded as aforesaid to be evidence thereof, in the same manner and to have the same effect as if such deed had been originally executed, acknowledged and recorded according to law.

in actual and full possession, was an answer to the bill for partition even if there had been no other defence proved. The bill was therefore dismissed.

The Court of Appeals, while discussing somewhat the defence that complainants were out of possession, did not decide the case upon that ground, but held that the power of attorney (properly acknowledged by Mrs. Ransom, as above stated) duly conferred upon the attorney in fact the legal power to convey Mrs. Ransom's interest in the land; that the war did not revoke the power; that the paper executed and delivered by the attorney in fact was not a conveyance, but only a contract for the sale and conveyance of the land; that the act of Congress did not apply to such a paper; and, lastly, that the contract of sale was within the scope of the power of attorney, and vested in the purchaser an equitable interest or estate which, upon general equitable principles, a court of equity would not divest out of the vendee in the absence of fraud, and no fraud being alleged or shown, and the purchase money having been received by Mrs. Ransom, equity would not set aside the sale. We will now state the conclusions to which we have come regarding these questions:

And, first, as to the question whether the power of attorney executed by Lieutenant Ransom and wife to George Gibson Huntt authorized and enabled the attorney to bargain and sell and convey, or contract to convey by deed of bargain and sale, the property therein mentioned. We think it did.

Under the laws of Maryland, which were in force in the District of Columbia in 1859, we think it was then competent for a married woman, outside of the District, to execute, with her husband, a power of attorney to convey her lands therein, which, when acknowledged by her according to the statute relating to the acknowledgment by married women of deeds conveying their real property in the District, thereby became a valid and sufficient instrument to authorize the conveyance by attorney. It is not claimed that the acknowledgment to the power of attorney in this case was insufficient in matter of form to comply with the statute in that respect.

The real contention is, assuming the acknowledgment to have been sufficient, that a married woman could not by any manner of acknowledgment appoint an attorney with authority to convey her lands. It is true that by the common law a married woman could not convey an estate of freehold owned by her unless by levying a fine or suffering a common recovery. This was altered by the statute in England of 3 & 4 Will. IV, c. 74, abolishing fines and recoveries, and providing other means for the conveyance of estates. In most, if not all, of the States of the Union, statutes have been passed providing for the manner in which a married woman can dispose of her real estate. These statutes were intended to and did set aside the technicalities of the common law, and they provided some simple and effectual method for the transfer of the interests of married women in real estate. The Chief Justice of the Court of Appeals of the District of Columbia, in delivering the opinion of that court in this case, has cited several Maryland statutes which the court holds were in force in this District in 1859, and those statutes are also held to provide for the case of the execution of a power of attorney by a married woman joined in by her husband and privily acknowledged by her, authorizing the attorney in fact to convey her real property in the District.

This separate acknowledgment is provided for in probably all the statutes of the various States relating to the subject of the conveyance by married women of any interest they may have in real estate. It has been said to be the most important and essential element in the method employed to transfer such estates.

The statutes referred to in the opinion are the statutes of Maryland of 1715, c. 47; 1752, c. 8; and 1766, c. 14; and in those statutes the ceremony of the private examination of the married woman and her voluntary acknowledgment of the deed were made substitutes for the private examination as to her voluntary consent in the levying of the fine or the suffering of a common recovery. After citing these various statutes of Maryland and commenting upon their provisions relating to conveyances of married women, the Chief Justice, in his opinion in this case, says:

"These provisions of the acts of 1715 and 1766 were in force in this District in 1859, and are still in force, and they were in no respect repealed by or in conflict with the acts of Congress of the 31st of May, 1832, (4 Stat. 520,) and of the 20th of April, 1838, (5 Stat. 226, relating to the execution and acknowledgment of deeds for land in the District of Columbia. The acts of Congress do not profess to repeal the acts of Maryland of 1715 and 1766, or to be exclusive in their operation; but they have, in some particulars, not involved here, amplified and extended the provisions of the former statutes then in force. And, construing these statutes all together, and looking to the reason and policy upon which they are founded, it would seem to be clear that in the year 1859 and down to the year 1865, it was competent to a *feme covert*, by a joint power of attorney with her husband, duly executed and acknowledged according to the forms prescribed by the statute, to execute and acknowledge a valid deed of conveyance of her real estate situate in the District of Columbia. It is well settled that a power to convey land must possess the same requisites, and observe the same solemnities in execution and acknowledgment, as are necessary in a deed directly conveying the land; and that a title to land can only be acquired and lost according to the laws of the place where the land is situated. (*Clark* v. *Graham*, 6 Wheat. 577.) In this case, the property to be conveyed was specifically mentioned and described in the power of attorney; and the power of attorney was executed and acknowledged at Carlisle, in the State of Pennsylvania, by husband and wife, under their hands and seals, and the acknowledgment and authentication of the instrument was in all respects in accordance with the provisions of the statutes in force in the District of Columbia, providing the manner and form in which the real estate of *femes coverts* could be conveyed. Indeed, we do not understand that the statutory requirement in respect to the form of acknowledgment and authentication thereof, is a matter of objection. The terms of the statutes, 'any grantor or bargainor of any lands or tenements,' being out of the province; or 'any person or persons conveying,' etc.; not residing in the prov-

ince at the time,' etc., 'may acknowledge said deed by letter of attorney, well and sufficiently proved,' etc., are sufficient to embrace *femes coverts*, authorized to sell and convey their real estate. If not, then the husband could not sell and convey by power of attorney, free of the contingent right of dower of his wife, for if the wife could not acknowledge by power of attorney a deed for the conveyance of her own real estate, she would be equally unable to acknowledge, by power of attorney, a deed for the relinquishment of dower in the lands of her husband. Such disability, we think, was never intended by the legislatures passing the statutes to which we have referred, to be fixed upon *femes coverts*, having lands with right to convey the same."

We give great weight to the views expressed by the Chief Justice in regard to these statutes of Maryland because, as is well known, he occupied for many years a seat upon the bench as Chief Justice of the Court of Appeals of that State, and is specially familiar with its laws and the construction given them by the courts of the State. In addition to such circumstance and from a perusal of the various statutes cited, our own judgment concurs with the Court of Appeals upon this question. We think a clear implication arises from the provisions of these acts that a power of attorney such as has been described, and acknowledged as already mentioned, was good in 1859 in this District. We can think of no good reason for excluding such implication. Where the person is by the statute allowed to do the principal thing directly, we think she could do it by power of attorney as described in this case. The power to convey includes in such case the power to appoint another to do the same thing. We, therefore, agree with the views expressed by some of the text writers, when power is given by statute to married women to convey their interest in real estate where their husbands join in the conveyance and where the private examination is made, that in such cases the right of the wife to dispose of it by power of attorney joined in by her husband and where she was privately examined, etc., would naturally be implied. The common law which incapacitates a married woman from making a contract

in general is so far altered by the statute as to permit her to execute a power of attorney and to therein contract to ratify his acts, instead of conveying directly, as the statute in terms provides. (See Washburn on Real Property, [4th ed.] vol. 3, p. 258.) The author there says: "It is laid down unqualifiedly, in some of the States, that a married woman cannot make a valid power of attorney, even jointly with her husband, to make a deed of her interest. But it is difficult to perceive any reason for the rule where she can do the principal thing herself; and such a right is clearly recognized by statute in Massachusetts. A similar right is also recognized by statute in New York." We do not think the aid of a statute is necessary. When the power is given her by law to convey directly, she can by the same ceremonies authorize another to do the act for her. The reasoning which would prevent it is, as we think, entirely too technical, fragile and refined for constant use. It is said in Story on Agency, sec. 6: "So in regard to married women, ordinarily they are incapable of appointing an agent or attorney; and even in case of a joint suit at law, an appointment of an attorney by a married woman is void; and her husband may make an attorney for both. But where a married woman is capable of doing an act, or of transferring property or rights with the assent of her husband, there, perhaps, she may, with the assent of her husband, appoint an agent or attorney to do the same." In this case we hold that, as the wife was capable of conveying her real estate in Washington in 1859, by a deed, properly executed and acknowledged by her privily, etc., and joined in by her husband, she could accomplish the same thing by authorizing another to convey for her, where the authority was joined in by her husband, and the required private examination, etc., made.

The Court of Appeals of Maryland has never, so far as we can discover, construed the statutes above cited in any manner opposed to the views expressed by the Court of Appeals of this District in this case. The cases of *Webster's Lessees* v. *Hall*, 2 Harr. & McH. 19; *Flanniğan* v. *Young*, 2 Harr. & McH. 38; *Hollingsworth* v. *McDonald*, 2 Harr. & Johns. 230;

and *Lawrence* v. *Heister*, 3 Harr. & Johns. 371, in which the above-named statutes are referred to, were all cases where deeds had been executed and where the acknowledgment of either the wife or the husband was held to be defective under the provisions of those statutes. In some of the cases it was said to be necessary, in order to pass the interest of the wife in her land, that she and her husband must join in the deed as grantors, which must be properly acknowledged, etc. This statement was not made as descriptive of the only method by which a married woman could convey her land, but was made in relation to the defective manner in which the deed of conveyance was executed in the particular case, which was the case of a deed defectively acknowledged under the statute. No decision has been cited by counsel for the appellants from the courts of Maryland which is inconsistent with or opposed to the construction given to these statutes by the court below.

In *Holladay* v. *Daily*, 19 Wall. 606, 610, the plaintiff and his wife appointed an attorney with general power to convey land which belonged to the husband. The attorney in fact subsequently conveyed the lands, and the plaintiff Holladay, after such conveyance, alleging that he had never received any of the consideration money recited in the deed, sued to recover back the possession of the land. The only question was as to the sufficiency in law of the power of attorney from Holladay and wife to Hughes, the attorney in fact, and his deed thereunder to pass the title of the husband. It was held that the power was sufficient, the court saying: "Here the object, and the sole object, of the power was to enable the attorney to pass the title freed from any possible claim of the wife; and under the law of Colorado that result could be accomplished by the deed of the husband alone as fully without as with her signature." What was said by the learned justice in delivering the opinion of the court in that case in regard to the manner in which the interest of married women in real estate could be conveyed was not necessary to the decision of the case, the point decided being that, considering its form, the power of attorney signed by the husband and wife was valid to convey his interest in the real property.

Finally, upon this branch of the case, we also concur with the lower court in holding that the first section of the act of Congress, already mentioned, contains a clear legislative recognition of the right to make this power of attorney. In this case, we think this fact is entitled to exceptional consideration. The act was evidently drawn with care, and it fully and plainly describes the different defects of the various instruments upon which it was intended to operate. Although the section is quite long and the phraseology is somewhat involved, yet the meaning of the section is perfectly clear. Certain provisions therein fully recognize the then existing right of a married woman to appoint jointly with her husband an attorney in fact to convey lands owned by her in this District, and language is used for the purpose of curing certain named defects which might exist in the execution or acknowledgment of such a paper. Speaking of the acknowledgment, the statute in the first section proceeds in this way: "*And provided, also,* That when the power of attorney shall have been executed by a *feme covert*, the same shall be effectual and sufficient if there shall have been such an acknowledgment of the same as would be sufficient, under the provisions of this act, to pass her estate and interest therein were she a party executing the deed of conveyance, the record and copy thereof of any deed recorded as aforesaid to be evidence thereof, in the same manner and to have the same effect as if such deed had been originally executed, acknowledged and recorded according to law." It had already been provided in the section "that the certificate of acknowledgment by a *feme covert* shall show that the acknowledgment was made 'apart' or 'privily' from her husband, or use some other term importing that her acknowledgment was made out of his presence, and also that she acknowledged or declared that she willingly executed or that she willingly acknowledged the deed, or that the same was her voluntary act, or to that effect."

The acknowledgment attached to the power of attorney in this case was sufficient under the provisions of this act to pass the estate and interest of Mrs. Ransom if she had been a

party executing a deed conveying her real estate in the District.

Upon a consideration of all the circumstances, we have no doubt that the power of attorney in question was properly executed and acknowledged, and that it authorized the person named therein as attorney in fact to convey Mrs. Ransom's real estate situated in this District.

(2.) The next question which arises is whether this power of attorney was revoked by the war which broke out between the two sections of the country in 1861.

Lieutenant Ransom, although one of the last officers to go out, did resign his commission in the army of the United States and went South and entered the army of the Confederacy, in which, before the close of the war, he attained high rank. His wife followed him, so that during the war they were both inside the lines of the Confederacy.

We are of opinion that the war did not revoke the power of attorney executed by Mrs. Ransom and her husband. It is not every agency that is necessarily revoked by the breaking out of a war between two countries, in which the principal and agent respectively live. Certain kinds of agencies are undoubtedly revoked by the breaking out of hostilities. Agents of an insurance company, it is said, would come within that rule. *Insurance Company* v. *Davis*, 95 U. S. 425, 429. In that case Mr. Justice Bradley, in delivering the opinion of the court, said:

"That war suspends all commercial intercourse between the citizens of two belligerent countries or States, except so far as may be allowed by the sovereign authority, has been so often asserted and explained in this court within the last fifteen years that any further discussion of that proposition would be out of place. As a consequence of this fundamental proposition it must follow that no active business can be maintained, either personally or by correspondence, or through an agent, by the citizens of one belligerent with the citizens of the other. The only exception to the rule recognized in the books, if we lay out of view contracts for ransom and other matters of absolute necessity, is that of allowing the payment

of debts to an agent of an alien enemy, where such agent resides in the same State with the debtor. But this indulgence is subject to restrictions. In the first place, it must not be done with the view of transmitting the funds to the principal during the continuance of the war; though, if so transmitted without the debtor's connivance, he will not be responsible for it."

The learned judge then adds that, in order to the subsistence of the agency during the war, it must have the assent of the parties.

These remarks were made in relation to the case then before the court, which was an action on a policy of life insurance issued by a New York corporation before the war upon the life of Davis, a citizen and resident of the State of Virginia. The premiums were regularly paid until the beginning of the war, the last one having been made December 28, 1860. Previous to the war the company had an agent residing in Petersburg, Virginia, where the assured also resided, and premiums on the policy had been paid him in the usual way. About a year after the war broke out the agent entered the Confederate service and remained there until the close of the war. An offer of payment of the premium due in December, 1861, was made to the agent, which he declined to receive, alleging that he had received no receipts from the company, and that the money, if he did receive it, would be confiscated by the Confederate government. He testified that he refused to receive any premiums, had no connection with the company during the war, and after it terminated did not resume his agency. Davis died in September, 1867. The plaintiff below was assignee of the policy, and claimed to recover the amount of ten thousand dollars on the ground that he was guilty of no laches and that at the close of the war the policy revived. The judge instructed the jury that if the assured was ready and offered to pay his premium to the agent in Virginia, after the breaking out of the war, there was no forfeiture of the policy, although the agent refused to receive the money, if within a reasonable time after the war he endeavored to pay his premium and the company refused to receive it. The defendant contended that the war put an end

to the agency, and that the offer to pay the premium to the former agent was of no validity, and the failure to pay rendered the policy void. This court held that the case was nearly on all fours with that of the *New York Life Insurance Company* v. *Statham*, 93 U. S. 24, but the point as to the supposed power of an agent of a company in the adhering States to receive premiums in a State in insurrection after the war broke out not having been specially adverted to in the opinion of the court in that case, it was particularly considered in the *Davis case*, as above quoted from. It was in relation to such an agency that the remarks were made. Agents of a life insurance company are undoubtedly engaged in the active business of their principal. Their duty is to receive the premiums for all policies obtained by them and to transmit such premiums to the home office. The prompt transmission of such premiums is a necessity for the successful prosecution of the business of the company. Upon their receipt the company is able to invest them in some interest-bearing security, and thus provide funds for the ultimate payment of the policy when it matures. It is easy to see that active and continuous business of such a nature could not be carried on during a war where the principal and the agent reside in the different countries engaged in such war.

In the case of *Kershaw* v. *Kelsey*, 100 Mass. 561, the general subject of contracts and business entered into and transacted between the citizens of the different States at war with each other is examined, and the question treated with great care by Mr. Justice Gray in delivering the opinion of the Supreme Judicial Court of Massachusetts, and numerous authorities are referred to and commented upon in the opinion. In the course of that opinion it was said at page 572: "The result is, that the law of nations, as judicially declared, prohibits all intercourse between citizens of the two belligerents which is inconsistent with the state of war between their countries; and that this includes any act of voluntary submission to the enemy, or receiving his protection; as well any act or contract which tends to increase his resources; and every kind of trading or commercial dealing or intercourse, whether by

transmission of money or goods, or orders for the delivery of either, between the two countries, directly or indirectly, or through the intervention of third persons or partnerships, or by contracts in any form looking to or involving such transmission, or by insurances upon trade with or by the enemy. Beyond the principle of these cases the prohibition has not been carried by judicial decision. The more sweeping statements in the text-books are taken from the *dicta* which we have already examined, and in none of them is any other example given than those just mentioned. At this age of the world, when all the tendencies of the law of nations are to exempt individuals and private contracts from injury or restraint in consequence of war between their governments, we are not disposed to declare such contracts unlawful as have not been heretofore adjudged to be inconsistent with a state of war."

Under the circumstances of this case, we think the attorney in fact had the right to make the conveyance he did. It was not an agency of the class such as is mentioned in *Insurance Company* v. *Davis*, *supra*, and was not necessarily revoked and avoided by the war. Where it is obviously and plainly against the interest of the principal that the agency should continue, or where its continuance would impose some new obligation or burden, the assent of the principal to the continuance of the agency after the war broke out will not be presumed but must be proved, either by his subsequent ratification or in some other manner. And on the other hand, where it is the manifest interest of the principal that the agency, constituted before the war, should continue, the assent of the principal will be presumed. Or, if the agent continues to act as such, and his so acting is subsequently ratified by the principal, then those acts are just as valid and binding upon the principal as if no war had intervened. *Insurance Company* v. *Davis*, *supra*.

It is entirely plain, as we think, that the mere fact of the breaking out of a war does not necessarily and as a matter of law revoke every agency. Whether it is revoked or not depends upon the circumstances surrounding the case and the

nature and character of the agency. This case shows that in 1859, at the time when the power of attorney was executed, Lieutenant Ransom and his wife were desirous of realizing their share of the value of the land in controversy. It was vacant, unimproved land in the city of Washington, and the charge for taxes was quite burdensome. The parties desired to realize the money. No sale of the property was effected from that time until the latter part of 1864, or early part of 1865. There is no evidence of any such change of circumstances as would naturally suggest a revocation of the authority to sell, but on the contrary the testimony is otherwise. It appears to have been to the interest of all parties to sell and thus to free themselves from a constant source of expense. In addition to that, the evidence is clear and sufficient that after the sale the action of the attorney in fact of Mrs. Ransom was ratified and confirmed by her by the receipt of her share of the purchase money or its expenditure for her benefit and with her assent and approval. Her sister, Mrs. Gibson, testified that Mrs. Ransom's share of the purchase money was either paid over to her or expended for her at her direction. This full and complete ratification of the act of the agent shows conclusively the assent of the principal to the continuance of the agency notwithstanding the war. Some criticism is made upon this testimony of Mrs. Gibson because, after the passage of so many years, she is unable to state definitely which course was pursued, whether the money was paid to Mrs. Ransom, or whether it was expended for her at her direction. We think the criticism is not well founded. Mrs. Gibson might well have been able to state with absolute certainty that she either paid the money to Mrs. Ransom or expended it for her at her direction, and yet after this lapse of time she might also be unable to state with like certainty which of the two courses was pursued. It is perfectly possible for a witness to be certain of the ultimate fact and yet to have forgotten the intermediate facts upon which that ultimate fact was based.

Here we have a power of attorney properly executed for the purpose of selling, among other lots, this real estate in question, and a state of circumstances which fairly shows that

it was for the benefit and interest of the principal that such real estate should be sold at the time the sale in fact occurred; we have also the principal's receipt of her share of the purchase money in 1865, with full knowledge of all the facts, and her acquiescence in and approval of the action of her attorney up to the time of her death in February, 1881. Upon these facts, we think it clear that the instrument executed by the attorney in fact was as valid and effectual as if no war had intervened. The ratification of the act of the attorney was full and complete. It recognized and assented to the continued existence of the agency. The purchase money for the land was received by the principal, and to permit her heirs after her death to repudiate the transaction on the ground that the power of attorney had been revoked would be at war with every principle of equity and fair dealing. This principle applies as strongly in the case of a married woman as in any other, and it will not permit her or, upon her death, her heirs at law to repudiate a transaction the benefits of which she received with full knowledge of the circumstances attending it, and yet claim to recover an estate which had been sold with her authority and the purchase money for which had been paid to her. *Bein* v. *Heath*, 6 How. 228, 247; *Bank* v. *Partee*, 99 U. S. 325, 329. *Bedford* v. *Burton*, 106 U. S. 338, considers generally the obligation of married women to do equity under circumstances somewhat similar in principle to the present case.

Nor does the act of Congress of July 17, 1862, c. 189, 12 Stat. 589, to suppress insurrection, etc., have any effect upon the sales, transfers or conveyance of the estate and property of persons in rebellion after September 23, 1862, except as to the United States. As against that Government, the transfers of property liable to seizure were null and void; they were not void as between private parties or against any other party than the United States. *Conrad* v. *Waples*, 96 U. S. 279, 288.

(3.) Even though the power of attorney were valid and had not been revoked by the war, it is objected that the instrument executed by the attorney in fact conveyed no title, but at best was a mere contract of sale; and,

(4.) That this objection is not cured by the act of Congress, above set forth.

These two questions may be considered together; and it makes no difference in the result whether the instrument be construed as conveying a legal title, or an equitable title only.

Some of the justices of this court concur in opinion with the Court of Appeals that, taking all the provisions of the instrument together, it did not amount to a deed of conveyance, but only to an agreement to convey made by an attorney who was authorized by his power to make a conveyance. In that aspect of the case, the instrument would convey an equitable title, which would afford a good defence to this bill; and it would be unnecessary to invoke the curative act of Congress.

But a majority of this court is of opinion that the instrument was in the nature of a conveyance of the legal title, though defectively executed, and that it came within the provisions of the act, and the defect was thereby cured.

We agree generally that although there are words of conveyance *in præsenti* in a contract for the purchase and sale of lands, still, if from the whole instrument it is manifest that further conveyances were contemplated by the parties, it will be considered an agreement to convey and not a conveyance. The whole question is one of intention to be gathered from the instrument itself. *Jackson* v. *Moncrief*, 5 Wend. 26; *Ogden* v. *Brown*, 33 Penn. St. 247; *Phillips* v. *Swank*, 120 Penn. St. 76.

Looking at the instrument executed by the attorney it will be seen that he refers to and annexes the power of attorney executed to him by Robert Ransom, Jr., and Mrs. Ransom, his wife, states the consideration received by him from Mr. Tayloe, acknowledges its receipt, and then acknowledges that he has "bargained and sold to Mr. B. O. Tayloe, his heirs and assigns, all the right, title and estate of them, the said Robert Ransom, Jr., and Mary Ransom, being one undivided third part of, in and to" the various pieces of ground, including the ground in question, and then adds, "with the improvements and appurtenances." Stopping here,

and construing the language of the instrument, there can be no question that it was executed as a conveyance of the interest of the principals in the land, and was intended as such by the attorney in fact. Although the instrument shows an intention on the part of the attorney to convey the title of his principals, yet, instead of signing their names by himself as attorney, he signs his own name, preceding the signature with the statement "In testimony whereof, I have hereunto set my hand and seal this 29th day of November, 1864." This is one of the defective executions of an instrument under a power of attorney, spoken of in the act of congress. It is alleged, however, that the following language, which appears at the end of the instrument executed by Huntt, changes the character of that instrument, and shows that it was not intended as a conveyance but as a simple contract of sale. The language referred to comes immediately after the words "with the improvements and appurtenances," and is as follows: "And I hereby further agree in behalf of said Robert and Mary Ransom, that they shall and will, as soon as convenient, make and execute a proper deed of conveyance of said premises to said Benjamin O. Tayloe in fee simple."

We do not think this language changes the effect of the prior portion of the instrument, nor does it show that the intention of the person executing it was simply to enter into a contract of sale. He is the only one who signs it. The instrument shows that he is executing it as an attorney in fact and by virtue of the power of attorney annexed to the instrument. Although he assumes therein to bargain and sell (in legal effect to convey) to Mr. Tayloe, his heirs and assigns, all the right, title and estate of his principals, being a one undivided third part of the real estate in question, yet he also agrees in the same instrument, in addition to the conveyance by himself of the title of his principals, to also obtain from them a deed of the same premises. This portion of the instrument is a contract in the nature of a covenant for further assurance. It may well be that the grantee, Mr. Tayloe, while taking the conveyance from the attorney in fact, and paying the full consideration for the land, would also desire to obtain

a deed conveying the same title and executed by the parties in person. This desire may easily be understood even upon the assumption that the instrument executed by virtue of the power of attorney was intended to convey the title. Such a deed would remove all possible question which could, in any event, arise based upon the fact that the conveyance was executed by an attorney instead of by a principal. The agreement to obtain a conveyance from his principals is entirely consistent with the prior portion of the instrument in which the attorney assumes to convey the title by virtue of the power of attorney which he annexes. If the attorney had, instead of agreeing on behalf of his principals that they should make and execute a proper deed of conveyance of the premises, agreed that he would himself at some future time make such a deed, a different question would be presented; for in that case, taking the whole instrument together, it might be argued that there was no intention at that time to convey the title. But, where, in addition to conveying the title himself by apt words, clearly expressed, he simply agrees to also procure a proper deed from his principals at some future time, there is nothing inconsistent in that agreement with the intention to himself convey the title by virtue of the power. Nor do we regard the fact as material upon this latter point that in the acknowledgment of the instrument in question, taken by two aldermen who were *ex officio* justices of the peace, they describe the instrument as a certain contract of sale, and certify that "Mr. Huntt executed said contract and acknowledged the same to be his act and deed." What the aldermen may have regarded as the legal effect of the instrument is not of much importance, and whether they described it as a contract of sale or as a conveyance cannot alter the character of the paper itself or its legal effect.

Being of opinion that the paper was in the nature of a conveyance, we also think that the defective execution of the instrument was cured by the act of Congress. This instrument was executed by the attorney in fact, who acknowledged the same to be his act and deed instead of the act and deed of his principals, and the act of Congress provides that in such case

the deed shall have the same effect as if such attorney in fact had acknowledged the deed to be the deed of the grantors (his principals). One or two other defects existed of a like nature, that is, of a nature which might be cured by a legislative act, and which were cured by the act in question.

The statute applies where the parties intended to convey, thought they had conveyed, and yet had not complied with the requisites necessary to make the conveyance in all things effective. In such case, especially where the consideration for the instrument has been received and retained, curative statutes may be passed which give validity to the defective instruments to the same extent as was intended by the parties at the time when they were executed. *Watson* v. *Mercer*, 8 Pet. 88, 110; *Randall* v. *Kreiger*, 23 Wall. 137.

The chief objection to the act, assuming that the instrument was a conveyance, is that it does not apply in this case as plaintiffs urge, because at the time when the act was passed the parties claiming through this deed were not, as plaintiffs contend, in the actual possession of the land covered by it. The statute declares the instrument is to have effect and validity to pass the fee simple to the estate intended to be conveyed and to bar dower in the real estate therein mentioned "in favor of parties in actual possession, claiming under and through such deeds." It is said that this limitation to the parties in actual possession refers to the time when the act was passed, and if the parties claiming under the deed were not at that time in actual possession of the premises, the statute has no application to them. We think the act applies if at the time when it was passed the parties claiming under the defective instrument were in actual possession of the land, and that the act also applies if the parties claiming under such instrument were not in actual possession at the time of its passage, but subsequently came into such possession. The act cured the defects in the instrument mentioned therein, if when it passed the parties were in actual possession, claiming under such instruments; and if thereafter ousted they could still claim the benefit of the act even in an attempt to regain possession. If not in actual possession

when the act was passed, they could not have the benefit thereof in an attempt to obtain possession thereafter. But if thereafter they were in actual possession, they could defend that possession under the act, so far as their title depended upon defective instruments existing at the time when the act was passed and which were of a character covered by its terms.

We think this is a fair construction of the act, and that it ought to be liberally construed for the purpose of obtaining the benefits it was clearly intended to give in the case of a defective execution of otherwise valid instruments. This view renders it unnecessary to decide as to the validity of the objection that these defendants were not in actual possession when the act was passed. We do not decide whether they were or not. They were in actual and undisturbed possession at the commencement of this suit, and they can avail themselves of the act to protect such possession and their title under the deed in question.

(5.) The fifth objection taken we have already answered in holding that Mrs. Ransom did, in fact, receive the purchase price of her share in the land with full knowledge that it was such purchase price, and thereby ratified and confirmed the act of her attorney.

By this disposition of the whole case upon the merits we are not to be considered as deciding that parties situated as the plaintiffs were in this case, out of possession, can maintain an action for partition. We have not discussed that question, and do not decide it, because it was unnecessary on account of the views we have stated in relation to the other aspects of the case.

We are of opinion that the complainants have failed to make out a cause of action, and the judgment dismissing the bill must, therefore, be

Affirmed.

Mr. Justice White did not sit in this case and took no part in its decision.